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CONVEYANCER'S NOTEBOOK

AMENDMENT OF PENSION SCHEMES

The drafting of pension scheme deeds and rules has its own peculiar difficulties. There are so many details to be covered and the inception of a scheme has a tendency to progress in alternate lulls and rushes that it is almost inevitable for some defect to creep in, with the result that after a time the rules become overlaid by a series of amendments in different styles and not entirely in harmony with the original rules or the other amendments. Nearly every scheme contains some power of amendment but in the nature of things that power cannot be unlimited. There are usually two principal limiting factors, the first, that the amendment shall be consistent with the object of the scheme and not result in the withdrawal of the Inland Revenue approval, and the second, to put it loosely, that vested rights are not taken away. In Phillips' *Pension Scheme Precedents*, the author has some sound advice on amendments and uttered an almost prophetic warning in paragraphs 4207 and 4208. He points out that a not uncommon restriction of the power to amend was a proviso to the effect that no amendment might be made which "significantly diminishes the value of the interest in the scheme of any member," and adds the comment that "these words have a wider meaning than they were probably intended to have . . . [for] almost any change in a scheme's provisions 'might diminish the value of the interest' of at least some of the members."

In *Alfred Herbert, Ltd.* v. *Hancocks* [1960] 1 W.L.R. 271, a contributory pension scheme was introduced by a booklet issued

in February 1939, which contained the following provision: "Change of scheme. While the company has every hope of maintaining its contributions to the scheme, the right is reserved in the event of unforeseen circumstances to discontinue the scheme after six months' notice, or suspend or amend it . . . without prejudice, however, to the pension benefits secured by contributions already paid." The scheme provided a death benefit if a member died before going on pension and the benefit was payable to his estate. In 1955 the company by one amendment increased the death benefit and by another provided that a member might nominate a beneficiary from a certain class, and, if he did not, the benefit would go to his surviving spouse or, if there was no surviving spouse, then to his estate. The amendment shows a modern tendency but many draftsmen would go further than this and give the trustees a complete discretion. At any rate, the amendment would enable a member to save estate duty: *Re Bibby & Son, Ltd. Pensions Trust Deed* [1952] 2 All E.R. 483.

Cross J. held that the power of amendment was very narrow: the power was not a general power but one reserved to the company; the amendment in question was not for the company's benefit and was therefore invalid. The learned judge expressly did not decide whether the amendment "prejudiced the pension benefits of the members": he thought there was a good deal to be said for the view that "pension benefits" did not include the death benefit. Finally, the question arose whether a member's estate could claim the larger benefit conferred by the earlier amendment. This point was not decided as there was not sufficient evidence before the court.

The complete confusion caused by striking down this type of amendment can only be fully conceived when it is realised that member A joining the scheme after the amendment will be bound, while member B joining before the amendment may be bound if he takes advantage of the amendment and member C placed in a difficulty because his estate wants the larger benefit while his widow struggles for part of it. A general power for the court to authorise amendments and to ratify unauthorised amendments is desirable.

Requisitioned Houses Act, 1960

The Requisitioned Houses Act, 1960, received the Royal Assent on March 22. The Requisitioned Houses and Housing Act, 1955, provided that the requisitioning of houses should come to an end on March 31, 1960—that was to be the final date. Owners were invited to accept licensees as statutory tenants and offered a certain

pecuniary inducement. The "final date" has now been extended. The Minister may extend the period in the case of any local authority for up to a further year. The order may extend to all the requisitioned houses of the authority or only some of them. The local authority is required to give notice of the extension to any owner affected. The rental compensation in respect of any period after March 31 is increased by 50 per cent. There are minor amendments to the 1955 Act.

This new Act is a rather serious breach of faith on the part of the Government. In 1955 the cynical said "Take your money, for the requisition period will be extended." Those who considered carefully the alternatives and decided to accept their houses back at the end of the period and have not had their houses released have good reason to complain that they have been cheated of their bargain. It is one thing to say "You can accept alternative A or B," and then withdraw both, but quite another to say, "As you have not accepted alternative A, alternative B is now going to be altered."

Community of Property and English Land

Who among lawyers can forget *Tulk* v. *Moxhay* as he walks through Leicester Square or *De Nicols* v. *Curtier* [1900] A.C. 21 as he dines at the Café Royal? He may perhaps be pardoned if he forgets *Re De Nicols* [1900] 2 Ch. 410, though this is one of Kekewich J.'s happier decisions.

Practitioners are apt to overlook that more people in Europe and America are married in community of property than out of it and when they come after marriage to England their proprietary rights are governed by the régime fixed for them by the country of their domicile at the time of marriage. When they buy land or take divorce proceedings here, inquiry should always be made as to their matrimonial régime, for otherwise valuable rights of one spouse (usually the wife) may be lost.

In *Callwood* v. *Callwood* [1960] 2 W.L.R. 705, the Privy Council had to consider the effect of marriage in community under Danish law on the ownership of land in the British Virgin Islands. It was held on a very narrow technical ground that the community did not apply. The wife had failed to adduce evidence that the Danish community system applied to land outside Denmark and its dependencies. The Privy Council clearly approved *Re De Nicols*. If the community system, like the French one in *Re De Nicols* and the Roman-Dutch one in *Chiwell* v. *Carlyon* (1897) 14 S.C.

(S.A.) 61, purports to affect foreign land, our courts will recognise its application to English land. Even if the community system does not include foreign land, English land may still be affected, for property acquired after the marriage must presumably be acquired out of community funds. *Callwood* v. *Callwood* was a case where the property in question was acquired before the marriage. It always seems an unhappy state of affairs when a party fails on a purely technical ground and it seems unfortunate that the Board did not refer the matter back for further evidence, particularly as it seems unlikely that Danish law would differ on the point in question from the standard European practice.

Tithe Redemption Office

The functions of the Tithe Redemption Commission were transferred to the Board of Inland Revenue on April 1 by the Tithe Redemption Commission (Transfer of Functions and Dissolution) Order, 1959. Redemption annuities payable under the Tithe Acts, 1936 to 1951, will continue to be payable annually on October 1. Directions as to the address to which payment should be made will be sent with the next demand notices. Correspondence should be addressed to:

The Controller,
Tithe Redemption Office,
Inland Revenue,
33/37 Finsbury Square,
London, E.C.2.

Landlord and Tenant Act, 1954—Validity of Notices

Attention may be drawn to a decision of Deputy Judge Dix in *Parrott* v. *Mrs. Hunt* (1960) 110 L.J. 208 where he held that the county court had no jurisdiction to determine a preliminary issue, whether or not a landlord's notice under section 25 of the Landlord and Tenant Act, 1954, was invalid, where a tenant was applying in the alternative for a new tenancy. In general, proceedings in the county court for a new lease have every advantage over those in the High Court, from cheapness to speed, and it is to be hoped that if this view prevails the position will be rectified by Parliament. With respect, if the county court has jurisdiction to decide a particular matter, surely it must also have jurisdiction to decide any incidental matter on which its main jurisdiction depends.

The Horticulture Act, 1960

The Horticulture Act, 1960, which received the Royal Assent on March 22, deals in Part I with grants for horticultural improvements and in Part II with horticultural marketing. Part I empowers the Minister to make a scheme authorising grants of one-third of the reasonable expense of certain horticultural improvements. Part II provides for the establishment of a Horticultural Marketing Council, the expense of which will fall upon the industry.

DIRECTORS: THE CONFLICT OF INTEREST AND DUTY

By J. R. Lingard, ll.b., Solicitor

The Position at Common Law

It is a firmly established rule that directors of a company are trustees of the powers conferred upon them by its articles of association and must not exercise these powers for their own personal benefit. In *Piercy* v. *Mills & Co.*,[1] for example, Peterson J. held that "Directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control or the control of themselves and their friends over the affairs of the company," and cited authority showing that such power must be exercised for the benefit of the company as a whole.

Even in 1888, it could be said[2]: "It is impossible now to dispute the proposition that [directors] are in some sense trustees, that proposition having been established by a long series of cases." The position of a director was neatly summarised in *Great Eastern Ry.* v. *Turner*[3] in the following words: "The directors are the mere trustees or agents of the company—trustees of the company's money and property; agents in the transactions which they enter into on behalf of the company."

Indeed, the conception of the director as a trustee finds statutory recognition in section 448 of the Companies Act, 1948, which relieves a director from the consequences of a "breach of trust" in certain circumstances.

It is, however, a mistake to over-emphasise the analogy between a director and a trustee. *Percival* v. *Wright*[4] illustrates that the directors are not trustees for individual shareholders and may, therefore, purchase shares without disclosing to the vendors advantageous prospects of the company. Furthermore, in *Re City Equitable Fire Insurance Co.*,[5] Romer J. said: "It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But

[1] [1920] 1 Ch. 77, at p. 84.
[2] *Re Faure Electric Accumulator Co.* (1888) 40 Ch.D. 141, at p. 151.
[3] (1872) L.R. 8 Ch.App. 149, at p. 152.
[4] [1902] 2 Ch. 421.
[5] [1925] Ch. 407, at p. 426.

if the statement is meant to be an indication by way of an analogy of what those duties are, it appears to me to be wholly misleading." In the absence of an express provision to the contrary in the articles, a director is not bound to invest the company's assets in trustee securities ![6]

Nevertheless, a director is in a fiduciary capacity and must not let his personal interest conflict with his duty to the company. As stated by Sir Richard Baggallay in *North West Transportation Co.* v. *Beatty*[7]: "A director of a company is precluded from dealing, on behalf of the company, with himself and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound by fiduciary duty to protect; and this rule is as applicable to the case of one of several directors as to a managing or sole director."

The rule was amplified by the Court of Appeal in *Transvaal Lands Co.* v. *New Belgium Co.*,[8] in which it was said: "Where a director of a company has an interest as shareholder in another company or is in a fiduciary position towards and owes a duty to another company which is proposing to enter into engagements with the company of which he is a director, he is, in our opinion, within this rule. He has a personal interest within this rule or owes a duty which conflicts with his duty to the company of which he is a director. . . . Again, the validity or invalidity of a transaction cannot depend upon the extent of the adverse interest of the fiduciary agent any more than upon how far in any particular case the terms of the contract have been the best obtainable for the interest of the *cestui que trust*, upon which subject no inquiry is permitted."

It may be as well, at this stage, to examine some of the ways in which the conflicting interest may arise. We have seen that it is enough for a director to be director or shareholder of a company contracting with that to which he owes a fiduciary duty. It is also clear that if a director, or a company in which he is interested, guarantees or deposits security for a loan to the company, he is "interested" in any debenture which it subsequently issues as security for its obligation. Indeed, while the burden of proving the adverse interest rests on the company, once some such interest is shown, it is irrelevant that it is of a comparatively trivial nature.[9]

The general rule is that a director can neither vote at nor be counted in the quorum of a board meeting discussing a matter in which he is "interested." However, a director's duty to the

[6] *Burland* v. *Earle* [1902] A.C. 83.
[7] (1887) L.R. 12 App.Cas. 589, at p. 593.
[8] [1914] 2 Ch. 488, at p. 503.
[9] *Todd* v. *Robinson* (1884) 14 Q.B.D. 739.

company is defined by its articles and these may expressly or by necessary implication vary the strict rule. As Vaughan Williams L.J. said in *Costa Rica Ry. Co., Ltd.* v. *Forwood* [10]: "It is not really disputed that where there are articles of this sort and the director can show that what he did was authorised by the articles,—can show in other words that the company have by their relation with him as established by the articles, waived their right to have his unbiased voice in every matter and to require him to abstain from putting himself in a position where he might have conflicting interests, the director is (according to the decision of Lord Hatherley in *Imperial Mercantile Credit Association* v. *Coleman* [11]) entitled to rely upon the articles as justifying his action and thus escape the liability."

It may be observed that article 84 (2) of Table A of the Companies Act, 1948, itself varies the rule in the four cases there specified. The article provides:

> "A director shall not vote in respect of any contract or arrangement in which he is interested, and if he shall do so his vote shall not be counted, nor shall he be counted in the quorum present at the meeting, but neither of these prohibitions shall apply to—
>
> (*a*) any arrangement for giving any director any security or indemnity in respect of money lent by him to or obligations undertaken by him for the benefit of the company; or
>
> (*b*) to any arrangement for the giving by the company of any security to a third party in respect of a debt or obligation of the company for which the director himself has assumed responsibility in whole or in part under a guarantee or indemnity or by the deposit of a security; or
>
> (*c*) any contract by a director to subscribe for or underwrite shares or debentures of the company; or
>
> (*d*) any contract or arrangement with any other company in which he is interested only as an officer of the company or as holder of shares or other securities;
>
> and these prohibitions may at any time be suspended or relaxed to any extent . . . by the company in general meeting."

[10] [1901] 1 Ch. 746, at p. 763.
[11] (1871) 6 Ch.App. 558.

It is common (especially in the case of small private companies) to allow directors very wide freedom.[12] For example, articles sometimes provide: "A director shall be entitled to vote in respect of any contract or arrangement in which he is interested or upon any matter arising thereout and, if he shall so vote, his vote shall be counted and an interested director shall be counted in ascertaining whether a quorum is present at the meeting."

Even where the articles are narrowly drafted, the shareholders may waive their rights or ratify a prior breach by ordinary resolution at a general meeting. However, such a resolution is only effective if the notice convening the meeting gave full particulars of the specific nature of the conflicting interest of the director concerned (*Kaye* v. *Croydon Tramways Co.*[13]). Indeed, not only must there be a full disclosure, but the resolution can be set aside if it amounts to a fraud or oppression of the minority of shareholders: *Cook* v. *Deeks.*[14]

Apart from ratification at a formal meeting, it seems that the company will be estopped from denying its obligations if the shareholders acquiesce in the actions of the directors: *Parker & Cooper, Ltd.* v. *Reading.*[15] The rule is illustrated by the case of *Re Express Engineering Works, Ltd.*,[16] where a board meeting purported to sanction a contract even though all the directors were personally interested in the transaction and for this reason expressly precluded from voting by the articles. Nevertheless, the company was held to be bound because the directors concerned held all the issued share capital between them and had unanimously acquiesced in the procedure followed.

Where a third party dealing with a company has notice that one or more of the directors have an "interest" in the contract, he must be careful to see that the terms of any article excluding the general rule are strictly complied with. The dangers may be illustrated by a quotation from Romer J. in *Victors, Ltd.* v. *Lingard*[17] where he said: "It is . . . contended by the Bank that . . . the directors were not 'interested' in the matter within the meaning of the article. Looking, however, at the whole article, it seems to me that its object was to ensure to the company that its directors would not be placed in a position in which their personal interests might be in conflict with the duty they owe to the company and that in all

[12] However, companies desiring a quotation must comply with the Rules of the London Stock Exchange.
[13] [1898] 1 Ch. 358.
[14] [1916] 1 A.C. 554.
[15] [1926] Ch. 975.
[16] [1920] 1 Ch. 466.
[17] [1927] 1 Ch. 323, at p. 329.

transactions entered into by them on behalf of the company, the company should be able to rely upon their unbiased and independent judgment."

Where the articles do not expressly provide otherwise, no director with a conflicting interest will count towards the quorum present at the board meeting. If, as a result, there is no quorum, any resolutions passed do not bind the company unless expressly or by conduct ratified by the shareholders. However, under the rule in *Royal British Bank* v. *Turquand*,[18] persons dealing with a company are not concerned to inquire whether regulations governing its internal management have been complied with, if everything appears to be regular—that is, they are not concerned to inquire whether there was a quorum at the meeting: *Gloucester Bank* v. *Rudry*.[19] Nevertheless, while a third party without notice is protected, persons with actual or constructive notice of any discrepancy have no contractual rights against the company and any debenture or other security purported to be given to them is ineffective.[20]

Where "interested" directors fail adequately to disclose their interests in the manner required by the articles but sufficient independent directors were present at the meeting to constitute the quorum, the company may elect to rescind the contract (possibly even after completion) provided it returns any property transferred to it: *Transvaal Lands Co.* v. *New Belgium Co.*[21] However, in accordance with general equitable principles, a bona fide purchaser without notice of any breach of duty is protected and must not be prejudiced by the rescission: *Re Bonelli's Telegraph Co.*[22] Alternatively, the company may affirm the contract and retain any property transferred to it, but sue the "interested" director for any secret profit he may have made. However, if the breach of duty was "innocent" (as opposed to "fraudulent"), the company cannot recover any additional loss on an unprofitable contract from the director failing to make disclosure, unless it can prove negligence or some other actionable tort: *Re Lady Forrest Gold Mine Ltd.*[23]

Statutory Restrictions on "Interested" Directors

We have seen that the articles of many companies vary the common law rules and enable directors to vote on and be counted in the quorum of board meetings considering resolutions in which

[18] (1855) 5 E. & B. 248.
[19] [1895] 1 Ch. 629.
[20] See, however, the remedy of tracing.
[21] [1914] 2 Ch. 488.
[22] (1871) L.R. 12 Eq. 246.
[23] [1901] 1 Ch. 582.

they are personally interested. However, complete waiver would not be in the interests of shareholders and consequently the Companies Act, 1948, contains provisions giving limited protection to members which cannot be abrogated by the articles.

The most important of these is section 190 (1) which enacts: "It shall not be lawful for a company to make a loan to any person who is its director or a director of its holding company, or to enter into any guarantee or provide any security in connection with a loan made to such a person as aforesaid by any other person" (subject to the four exceptions therein mentioned—the principal being in favour of directors of exempt private companies).

It will be seen that section 190 is somewhat narrower than section 54 (which makes it "unlawful" for a company to give financial assistance in connection with a purchase of its own shares) in that the former does not extend its prohibition to all loans made "whether directly or indirectly." It is, therefore, possible for a company to guarantee and provide security in connection with a loan made to one of its directors if the director concerned uses the device of forming another company to borrow the money.

The other statutory provision of importance in protecting members from directors is section 199 (1) which enacts:

> "Subject to the provisions of this section, it shall be the duty of a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company to declare the nature of his interest *at a meeting of the directors* of the company."

However, subsection (3) allows a general notice to be given that a director is a member or director of a specified firm or company and is, therefore, interested in any contract with that concern. Subsection (4) then enacts: "Any director who fails to comply with the provisions of this section shall be liable to a fine not exceeding £100."

It will be noted that disclosure must be made "at a meeting of the directors." This implies two requirements, namely, that the meeting at which disclosure takes place must be duly convened and that a quorum must be present. It is clear from *Re Homer District Consolidated Gold Mines, Ltd.*,[24] that a meeting is not duly convened unless fair and reasonable notice is given to all the directors in accordance with the articles. Furthermore, it has been held that even where the articles permit one director to be a quorum, one director alone cannot constitute a "meeting": *Sharp* v. *Dawes*.[25]

[24] (1888) 39 Ch.D. 546.
[25] (1876) 2 Q.B.D. 26.

The difficulty which arises is whether the articles can mitigate the effect of section 199 by providing that "interested" directors may count towards the quorum at the meeting receiving the declaration. The general rule laid down in *Re Greymouth-Point Elizabeth Ry. Co., Ltd.*,[26] is that each director counting towards the quorum must be qualified to vote and if by the withdrawal of those directors who are disqualified on the ground of interest there would be no quorum, no business can be transacted. However, as we have seen, at the present day articles frequently allow "interested" directors to vote and to be counted towards the quorum.

As was shown by *Victors, Ltd.* v. *Lingard*,[27] in considering this problem, the wording of the articles must be examined carefully in each case. Some articles provide that a director shall only count in the quorum "*after* disclosing his interest in accordance with section 199." It is thought that where this precedent is used, the declaration must be made to an entirely independent board as the section provides that it shall be made to a "meeting" and we have seen that there can be no meeting unless a quorum is present. Indeed, under article 84 (1) of Table A of the 1948 Act, the declaration must be made at a "meeting" and even in the four cases excepted from the general rule under paragraph (2) of the article, it is doubtful whether the director with a conflicting interest may be counted in ascertaining whether there is a quorum at the meeting receiving the declaration.

However, articles are sometimes drafted whereby an "interested" director is expressed to count towards a quorum for all purposes. There would appear to be no inherent objection to such an article as section 134 of the Act only applies "so far as the articles of the company do not make other provision in that behalf." It is, therefore, for the articles to specify the number of persons required to constitute a quorum and there would seem to be a complete discretion. As Astbury J. said in *Re Fireproof Doors, Ltd.*[28]: "Though it is true that one shareholder cannot constitute a meeting—*Sharp* v. *Dawes*, *supra*—it is not clear that one director cannot form a quorum of a board of two, and it is quite clear on the authorities that there may be a delegation to a committee of one."

If the articles can define the requirements for a quorum in this manner, it is difficult to see why they cannot define its constitution in other respects. It is also unlikely that the court would extend

[26] [1904] 1 Ch. 32.
[27] [1927] 1 Ch. 323.
[28] [1916] 2 Ch. 142, at p. 149.

the rule in *Sharp* v. *Dawes*, *supra*, and hold that there was no "meeting" within the meaning of section 199 if all the directors present were "interested," since the basis of the decision was that [29] "the word 'meeting' prima facie means the coming together of more than one person."

Even if the articles preclude "interested" directors from voting and, therefore, from counting in the quorum at the board meeting, section 199 does not prevent shareholders from ratifying the board's action. However, as at common law, such a resolution is ineffective if it amounts to oppression of the minority of shareholders or the disclosure of the interest of the director concerned is inadequate. Again, as in *Victors, Ltd.* v. *Lingard* [30] itself, the shareholders may estop the company from denying its obligation. It may be that unless the disclosure is made to a "meeting of the directors" as well as to the shareholders, a director would technically be liable to a fine not exceeding £100, but it is unlikely that any such penalty would be imposed, and ratification by the shareholders would prevent the company rescinding the contract.

We now come to the question of whether a mortgagee or other person contracting with the company is concerned to see that section 199 is complied with or whether the section merely imposes a fine of £100 on any director who fails to make a full disclosure. If the purchaser has no notice of any discrepancy, he is no doubt protected by the rule in *Re Bonelli's Telegraph Co.*[31] Indeed, even if the purchaser has notice, it may be thought from some of the dicta in *Victor Battery Co., Ltd.* v. *Curry's, Ltd.*[32] (in which a debenture holder was held to have a "valid security" even though the transaction was rendered "unlawful" by section 54 of the Act) that the purchaser would not be penalised. There is some force in Roxburgh J.'s remark [33] that: "Punishment of the lender if intended, would have been expected to bear some relation to that of the principal offender, which is limited to £100."

However, the analogy with the *Victor Battery Co.* case is somewhat strained and the better view is that the company is in the same position if the directors fail to perform their statutory duty as it is if they fail to make the common law disclosure. It will, therefore, be seen that if there was no quorum present at the board meeting, any resolutions purported to be passed are invalid and will not bind the company. However, if there was a quorum present

[29] (1876) 2 Q.B.D. 26, at p. 29.
[30] [1927] 1 Ch. 323.
[31] (1871) L.R. 12 Eq. 246.
[32] [1946] 1 Ch. 242.
[33] *Ibid.*, at p. 247.

which complied with the provisions of the articles but certain directors merely failed to make the statutory disclosure, it seems that the company would be entitled to rescind any contract, but that rescission could only take place provided the company was in a position to return any property transferred to it: *Transvaal Lands Co.* v. *New Belgium Co.*[34]

Conclusion

It will be seen that certain controversial issues arise in connection with the above which will no doubt be considered by the committee inquiring into the working of the Companies Act. In conclusion, we may ask ourselves three questions:

(1) Is it not advisable to extend section 190 of the 1948 Act to financial assistance *indirectly* given by a company to one of its directors?

(2) Where the Act does express a transaction to be "unlawful," should it not provide that a debenture holder having notice of the contravention of the statutory provision should lose his security?

(3) Would it not be advisable to amend section 199 so as to make it the duty of a director to disclose his interest to a board at which there was an *independent* quorum? If thought desirable, exemption could be given to exempt private companies as in the case of the present section 190.

[34] [1914] 2 Ch. 488.

THE MODERN LAW OF AGRICULTURAL HOLDINGS—III

Mainly About Rents

By J. Muir Watt, m.a., Barrister-at-Law

Severance of the reversion

At the end of the last article of this series it was mentioned that difficult problems, upon which there is as yet no authority, were arising in connection with the severance of the reversion of an agricultural holding. It was intended to deal with these in this article, but as it is understood that there are some cases pending which may lead to the matter being judicially considered, it is proposed to postpone the discussion of this topic until later.

Agricultural Rents

This article will deal with a number of points concerned with agricultural rents. As the object of this series of articles is strictly practical, a good deal of the space will be devoted to the subject upon which it is most likely that the rural practitioner will be called upon to advise, namely, the machinery for effecting a variation of rent by arbitration. Before getting immersed in the details of the law, however, it is desirable, for a proper understanding of the matter, to look briefly at the economic background.

Agricultural rents: the economic background

Until recently, when there has been evidence of new movements, the general level of farm rents has remained remarkably low. The national average for the pre-war years was 21s. an acre. In 1945 it was 23s. 5d., in 1956, 36s. and in 1957, 38s. 9d. During the war years, farm rents rose by 11 per cent., but from 1945 to 1957 they advanced by 64 per cent. Since then they have continued to increase. By the end of 1958 the average was probably 70 per cent. above the 1945 level. These averages, of course, conceal wide variations between different districts and different types of farms. For example, the rent per acre of a market garden holding might be several times as much as that of an upland livestock farm. In 1957 the county in England and Wales with the highest average rent was Cheshire, with £3 3s. 9d. per acre, while the county with

the lowest average was Merioneth, with 9s. 7d. per acre. A masterly statistical analysis has recently been published, from which these figures have been taken, by Dr. D. R. Denman and Miss V. F. Stewart of Cambridge University. Their work is the outcome of a survey sponsored by the Ministry of Agriculture, with the co-operation of the Country Landowners' Association, the National Farmers' Union, the Royal Institution of Chartered Surveyors, the Chartered Land Agents' Society and the Chartered Auctioneers and Estate Agents' Institute. This study is the most detailed and thoroughgoing ever to be undertaken in this field and the results are presented with admirable clarity and technical skill.[1] Although the statistics show a more rapid tempo of increase in farm rents in recent years, the average level is still not high and the rents on many farms remain moderate or low. This is perhaps due in part to the fact that the approach of landowners to the problems of land-ownership is still not strictly economic, partly to the fact that higher rents may lead to higher estate duty valuations, and partly to the fact that heavy income tax and surtax also remove some of the incentive to seek an increase in rents.[2] Low rents coupled with excessive security of tenure have, however, undoubtedly had a detrimental effect upon the agricultural industry in this country. They have tended to encourage mediocre farming and have reduced the flow of long-term capital into the industry. It is sometimes said that high rents lead to high farming and it is certainly true that some farmers respond to low rents by farming below the standard which they are capable of achieving.

The rigidities of rent and tenure which have been a feature of the landlord and tenant system in England and Wales have had two unfortunate results. The first is a decline in the landlord-tenant system itself. When it is appreciated that the average level of farm rents today is still not markedly higher than it was in the early 1870s, and in terms of real purchasing power only a fraction of what it was, and that the landlord's freedom to remove an indifferent tenant has been severely curtailed, this is not surprising. Whereas before the First World War about 80 per cent. of the farm holdings above five acres in England and Wales were tenanted, by 1950 the percentage had fallen to 60 per cent., and by 1960 it is probably nearer 50 per cent. In addition to the growth of owner-occupation, the type of landownership in the tenanted sector has been changing. The number of private landlords, the traditional

[1] See *Farm Rents*, by D. R. Denman and V. F. Stewart, 1959 (George Allen and Unwin, Ltd.).
[2] See *Farm Rents and Tenure*, by J. T. Ward, 1959 (The Estates Gazette, Ltd.), Chap. 4.

" squires " of English society, has been declining in favour of institutional landlords, the university colleges, the Crown, the Church Commissioners, other large corporations and charities. The second unfortunate consequence is that the inadequacy of capital formation in the industry itself has created a need for outside financial assistance. The state has thus had to inject substantial capital into the industry in the form of various improvement and other capital grants. The cost of agricultural support generally is, indeed, a matter which causes a good deal of anxiety to thoughtful persons who are interested in the permanent welfare of British agriculture. Its present dependence on financial assistance of one kind or another is an indication of a fundamental weakness. While this weakness persists the industry tends to be at the mercy of varying political decisions, while over the long-term plans of individual landowners and farmers there hangs an unsettling atmosphere of uncertainty. All these difficulties, of course, are not due to rigidities of rent and tenure, but they are a contributory factor. It can thus be seen that the fixing of realistic rents and the machinery for bringing about a variation of rent when economic circumstances change are of great importance.

Meaning of " rent "

Rent means the totality of the payments (normally in money) made by the tenant in consideration of the grant of the subject-matter of the tenancy. Although it may be possible in abstract theory to distinguish between payment for what Ricardo called " the original and indestructible powers of the soil " and payment for improvements, in practice the two cannot be distinguished. Even if part of the rent can be identified as consisting of the interest on a recent improvement, it is still " rent " for the purpose of the Agricultural Holdings Act, 1948. The tenant may, of course, make certain payments to his landlord which are not " rent," and thus not subject to the provisions of the Act as to rent, such as the arbitration provisions. Thus, collateral bargains for a personal privilege, such as a payment for a licence to use a garage not included in the letting, do not affect rent.[3] There will rarely be any difficulty about distinguishing such payments from rent proper.

Methods of varying rent

In view of the very high degree of security of tenure which an agricultural tenant enjoys, it is vitally important that the landlord should be able to take some steps to obtain an increase of rent

[3] *Cf. Property Holding Co., Ltd.* v. *Clark* [1948] 1 K.B. 630 at p. 650.

if the circumstances justify it. Otherwise, he might be saddled with what is virtually a life tenancy at a rent which was becoming increasingly uneconomic.

There is no reason why the contract of tenancy should not itself have a "built-in" provision for the variation of rent, either by progressive increases or by reference, say, to an index number which registers changes in the general price level or in particular prices, such as the price of corn. It would, of course, be essential that the index number to be used should be clearly identified, and the method of using it clearly stated, so that no ambiguity as to the meaning of the reference would be possible. Such "built-in" provisions do not, however, appear to be very commonly found.

In practice variations of rent during the currency of a tenancy are usually the result of *ad hoc* agreement between the parties or of arbitration. Agreement may itself originate in different ways. It may be the outcome of direct negotiation between the parties, or the acceptance by the tenant of a proposal for an increase made by the landlord's valuer, or the acceptance by both parties of a figure arrived at by an independent valuer appointed by agreement (not to resolve a dispute, like an arbitrator, but to prevent a dispute from arising). Apart from agreement on a variation of rent during a tenancy, the rent may be increased on a change of tenancy, the new tenant agreeing to pay more than his predecessor.

It should be noted that if the rent is increased by agreement any instrument recording the agreement attracts stamp duty calculated on the difference between the old and new rents.[4]

Rent arbitrations

Rent arbitration as an independent substantive procedure dates from the Agriculture Act, 1947. Before then it had appeared in the agricultural holdings code as a subsidiary part of the provisions relating to compensation for disturbance. Section 12 of the Agricultural Holdings Act, 1923, provided that the tenant's refusal, or failure within a reasonable time, to agree to the landlord's written demand for arbitration as to rent was one of the grounds on which the tenant was liable to lose his compensation for disturbance. Contrariwise, where a landlord refused or failed to agree to the tenant's demand for arbitration as to rent, the tenant was enabled to claim compensation for disturbance, notwithstanding the fact that he, and not the landlord, took the initiative in terminating the tenancy.[5] The Agriculture Act, 1947, borrowing the basic idea of rent arbitration and adapting the language used in the earlier

[4] See s. 77 (5) of the Stamp Act, 1891.
[5] These provisions originated from s. 10 of the Agriculture Act, 1920.

legislation, transformed the procedure into a method of adjusting rent to changes in the circumstances of the holding. It was no longer merely a part of the compensation for disturbance machinery but an important provision in its own right. It has in fact proved to be a provision of great significance.

When arbitration applicable

A reference to arbitration can be demanded of the question " What rent should be payable in respect of the holding as from the next ensuing day on which the tenancy could have been determined by notice to quit given at the date of demanding the reference? " Apart from its possible application if there is a " break " clause, therefore, section 8 of the Agricultural Holdings Act, 1948 (which, as amended by section 2 of the Agriculture Act, 1958, is the operative provision) has no application during the currency of a lease for a fixed term. Its normal application will be to tenancies from year to year, which are in fact the commonest type of agricultural tenancies. It would, however, appear to follow from *Edell* v. *Dulieu* [6] that the machinery of section 8 could be used to fix the rent payable from the date when a lease for a term of years can be " broken " under an option to determine it before the expiration of the full term. If the option is mutual there seems little doubt that this is so, but the position is not so clear if the option is one-sided. Probably in that case the demand could be made by the party entitled to exercise the option but it would be possible to argue that in these circumstances neither party could make it because of the lack of mutuality.

The position at the end of a fixed term is interesting. Section 3 (1) provides that a term of two years or upwards shall not terminate by effluxion of time but shall continue as a tenancy from year to year unless, not less than one year nor more than two years before the date fixed for the expiration of the term, a written notice has been given by either party to the other of his intention to terminate the tenancy. Section 3 (2) provides (and this is important) that such a notice is to be deemed to be a notice to quit for the purposes of the Act. It seems, therefore, fairly clear that the rent could be varied as from the date of expiration of the fixed term provided that a demand for arbitration as to the rent is served not less than one year and not more than two years before the date fixed for the expiration of the term. It is not necessary to wait until the end of the first year of the yearly tenancy which follows upon the expiration of the fixed term, in order to vary the rent. If,

[6] [1924] A.C. 38.

however, the tenancy is for a fixed term, say, seven years, "and so on from year to year," the position is different. In such a case the rent could only be varied as from the end of the eighth year, since the earliest date at which the tenancy could be terminated by notice to quit would be the end of that year.[7]

Time limit for a rent arbitration

Although section 8 of the 1948 Act is careful to lay down the date as from which the rent can be varied by relating it to the earliest date at which the tenancy could have been determined by notice to quit given at the date of demanding the reference, the section lays nothing down about the time when the actual rent arbitration should take place. Before the Court of Appeal decision in *Sclater* v. *Horton*[8] there was considerable doubt on this point, evidenced by conflicting county court decisions. The Court of Appeal, however, managed to resolve the doubt by a fairly bold essay in interpretation and the following rules can now be stated, based partly on the section itself and partly on this decision:

(a) The demand for a reference to arbitration must be given as long before the term day on which it is proposed that the alteration of rent should take effect as a notice to quit would have to be given in order to terminate the tenancy on that day. Thus in the case of a Michaelmas tenancy, if the proposed rent change is to take effect on September 29, 1961, the demand must be served before September 29, 1960.

(b) The "date of the reference" (see below) must be a date before the term day on which the adjustment, if any, is to take effect.

(c) The "date of the reference" must be a date before the expiration of the year of the tenancy which begins after the demand for a reference has been served.

(d) The "date of the reference" means, not, as one might at first sight suppose, the date of the actual hearing of the arbitration, but the date of the effective appointment of the arbitrator. The arbitrator is not effectively appointed until he has accepted the appointment.

(e) If the arbitrator is not effectively appointed before (*i.e.*, if the date of the reference does not precede) the term day on which the proposed adjustment is to take effect (*i.e.*, the "next ensuing day") the demand for the reference ceases to be effective.

[7] *Cf. Herron* v. *Martin* (1911) 27 T.L.R. 431.

[8] [1954] 2 Q.B. 1.

(f) Although the actual hearing may take place after the term day on which the proposed adjustment is to take effect (*i.e.*, the " next ensuing day ") there are provisions in the Sixth Schedule to prevent delay once the arbitrator has been appointed. It is, of course, desirable in practice that the hearing should take place and the award be issued before that day.

A concrete example may make the matter clearer. If a demand for rent arbitration is served on September 1, 1960, in the case of a Michaelmas tenancy, with a view to an adjustment of rent taking effect from September 29, 1961, the arbitrator should be appointed and accept the appointment before September 29, 1961. The actual hearing, however, could take place after September 29, 1961. The parties in appointing an arbitrator by agreement, the Ministry in making an appointment from the panel of arbitrators, and the arbitrator himself in accepting an appointment, should keep these rules in mind. An arbitrator appointed after the term day from which the revised rent is to be effective would have no jurisdiction to make a rent award, although he would be able to make an award as to costs. Where it is necessary to apply to the Minister to appoint an arbitrator, this should be done at least six weeks (and preferably longer) before that day, as two or three members of the panel may have to be approached before one is found who is in a position to act.

The arbitrator's duty: open market rent: 1958 Act

The arbitrator's duty is to determine what rent should be properly payable in respect of the holding at the date of the reference. Until the Agriculture Act, 1958, the arbitrator was not given any guidance as to the meaning of " rent properly payable." The words " properly payable " seemed to connote something in the nature of a moral judgment on the rent. It was by no means clear that they referred to the open market rent. Certainly a great many arbitrators took them to mean something less than the open market rent. The 1958 Act,[9] however, added to section 8 (1) of the 1948 Act a provision that the rent properly payable for this purpose is to be the rent at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to be let in the open market by a willing landlord to a willing tenant, there being disregarded (in addition to the matters referred to in section 8 (2)) any effect on rent of the fact that the tenant who is a party to the arbitration is in occupation

[9] See s. 2.

of the holding. This wording is immediately derived from section 34 of the Landlord and Tenant Act, 1954, but some of the principles embodied in the formula may be traced back to the open-market rule for compensation for compulsory acquisition contained in section 2 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919. Some of the decisions on the latter statute are relevant, although certain distinctions flow from the fact that the arbitrator in the present case has to determine a periodical, not a once-and-for-all lump sum, payment. In view of the importance of the open-market rent formula which is now contained in section 8 of the 1948 Act, as amended by section 2 of the 1958 Act, it is proposed to analyse it in a little detail.

Rental value must be as an agricultural holding

The object is to determine the rent at which the holding might reasonably be expected to be let in the open market *as an agricultural holding*. This means that it must be looked at as land used for agriculture as a trade or business,[10] not as a purely non-commercial hobby into which considerations of profit and loss do not enter, nor for a profitable but non-agricultural purpose such as a riding school, nor for pure amenity or sport. But provided that the holding remains in substance an agricultural holding, the rent which is determined may quite legitimately reflect an element of profitability from an incidental non-agricultural purpose (not inconsistent with the terms of the tenancy), such as the letting of rooms with board to summer visitors in an attractively situated farmhouse, or sporting rights not reserved to the landlord.

Reasonable expectations

It is important to understand clearly the meaning of the reference to reasonable expectations in the formula. The reference is not to a reasonable rent. The arbitrator is not called upon to determine a reasonable rent as was the county court judge under the Leasehold Property (Temporary Provisions) Act, 1951.[11] The words "might reasonably be expected" refer to the expectations of properly qualified persons who have taken the pains to inform themselves of all the particulars ascertainable about the holding, its capabilities, the demand for it, and the likely potential tenants.[12]

[10] See 1948 Act, s. 1.

[11] That Act left it to the county court judge to determine a reasonable rent, without giving him any guidance. He had to sit, as the Attorney-General at the time said, "like a Cadi under a palm tree." See s. 12 of the Act and H. of C. Official Report for February 5, 1951, cols. 1427, 1430.

[12] This is an adaptation to rent of the words of Swinfen-Eady L.J. in *I. R. C.* v. *Clay* [1914] 3 K.B. 466 at 475.

It is not the rent itself but the expectation of what it would be that is to be reasonable. There is no element of moral judgment in the formula, nothing akin to the medieval ideas of a " just price " or " just rent." The concept of reasonableness has no application to the quantum of the rent; it relates to the reliability and objectivity of the forecasts of the properly qualified persons to whom the formula is appealing. If the formula is analysed further, it may be said that one may reasonably expect a willing landlord to exercise some prudence in the selection of tenants, in the long-term interests of the holding, and not necessarily to accept the highest offer of rent, which may not (although there will be occasions when it may) be made by a person likely to farm the holding on sound lines and safeguard its productivity. The test is not, therefore, the very highest bid that can be obtained. When farms are offered for letting by tender, as they sometimes are nowadays, it is not unusual to find that there are a few offers which are much above the others and even one or two which are fantastically beyond what one would expect. These very high offers are often ruled out on the ground that they are made by people who lack sufficient experience or knowledge or judgment to be suitable tenants. Instead of accepting one of the highest offers the landlord may decide to let the farm to an applicant whose offer is near the top of the middle batch and who appears likely to be a sound, careful and knowledgable farmer. It must be remembered that a landlord is in a different position from a vendor who may reasonably be expected to accept the highest bona fide offer from a financially sound bidder without worrying too much about what will happen to the land after he has completely parted with all interest in it. Thus, although evidence of offers made is certainly relevant, the arbitrator is perfectly entitled to disregard what he considers to be " freak " or " fancy " offers, since a willing landlord may reasonably be expected to think of the permanent well-being of the holding, and the security for future payments of rent, and to prefer a somewhat lower rent, which is likely to continue to be paid by a well-run and profitable farming enterprise, to a higher rent which the holding, if properly farmed, is not likely to continue to support indefinitely. It is, therefore, quite proper for the arbitrator to disregard rents which are likely to lead to the short-term exploitation of fertility. This by no means excludes scarcity value. A landlord may reasonably be expected to take full advantage of the scarcity of farms to let. Unlike section 2 (5) of the Valuation for Rating Act, 1953, the formula does not make any artificial assumption about demand and supply. Evidence of rents on comparable holdings is, of course, admissible, but the weight

which the arbitrator will attach to such evidence will depend on the extent to which he is satisfied that they really are comparable. The arbitrator may feel that unless he is given the opportunity of inspecting the other holdings in question he cannot attach a great deal of weight to the evidence, but he cannot refuse to hear evidence properly tendered about holdings which are alleged to be comparable even if he is not given the chance to inspect them.

Open market

The market to be considered is the open market, the general market, as distinct from a restricted field of negotiations confined to a limited class.[13] No one is to be excluded who might come forward to make an offer. The sitting tenant is himself one of the possible bidders. The market is not, however, a hypothetical market which is deemed to be exempt from any restrictions imposed by law.[14] It is the actual market as affected by any legal provisions or restrictions which are in existence and are relevant. In an open market the sitting tenant is neither specially privileged nor penalised, a point which is underlined by the specific provision to this effect later in the formula.

Willing landlord and willing tenant

A willing landlord and a willing tenant have to be assumed. The word " willing " excludes any element either of reluctance or of over-anxiety on the part of the assumed landlord or tenant. A desperate landlord and a desperate tenant are to be excluded. Neither must be treated as acting under compulsion or pressure, whether economic or otherwise. A " willing " landlord does not mean one who is willing to take any rent he can obtain, however low, but the phrase does exclude anything akin to the old " sympathetic hypothesis " of the unwilling seller in cases of compulsory acquisition before 1919, whose unwillingness had to be overcome by the payment of an extra 10 per cent.[15] The bargain is to be one freely acceptable to both of the assumed parties in the given state of the actual market, not a settlement imposed on either.

Disregard of the fact of the actual tenant's occupation

The fact that the actual tenant who is a party to the arbitration is in occupation of the holding is to be disregarded. The rent

[13] *Cf. I. R. C.* v. *Clay* [1914] 3 K.B. 466 at 475.
[14] *Cf. Priestman Collieries, Ltd.* v. *Northern District Valuation Board* [1950] 2 All E.R. 129 at 132.
[15] See *per* Scott L.J. in *Horn* v. *Sunderland Corporation* [1941] 2 K.B. 26 at 40.

which the arbitrator has to determine must not be influenced by any special considerations arising from the tenant's occupation. The instruction to disregard such factors is similar to that in section 34 of the Landlord and Tenant Act, 1954, which was considered in *Harewood Hotels, Ltd.* v. *Harris*,[16] where Lord Evershed M.R. approved a comment in *Woodfall*[17] that " this seems to dispose equally of any accretion to the rent attributable to such occupation (the premises have to be envisaged as empty premises in the market) and of the ' sitting tenant ' concession which was sometimes allowed for in assessing a ' reasonable ' rent under the Act of 1951." It may indeed be said that the formula as a whole, including both the open market part of it and the present instruction, excludes any concession to the sitting tenant as compared with an outsider based on the former's privileged position of security, and at the same time prevents the sitting tenant from being treated as in a worse position than an outsider because of his special anxiety to avoid disturbance. The sitting tenant's position in so far as he has spent money on improvements or has practised a system of " high farming " is, however, as will be seen below, fully protected.

Other matters to be disregarded by the arbitrator

In addition to disregarding any effect on rent of the fact of the actual tenant's occupation, the arbitrator is told not to take the following matters into account:

(a) An increase in rental value due to improvements executed at the tenant's expense, provided that no equivalent benefit has been given for them by the landlord, and that the tenant was not bound by the contract of tenancy to execute them. " Improvements " for this purpose are not confined to those in the Schedules to the Act, nor to those for which the tenant could claim compensation on the termination of the tenancy on quitting the holding, and they include " high farming."[18] Improvements executed by the tenant are to be disregarded even if his expense has been or will be reimbursed by an Exchequer grant.[19] It must be noted that the arbitrator is not to take into account " any increase in the rental value of the holding " which is due to the tenant's improvements. This means that if the effect of the tenant's improvements is to enhance the letting value of the farm by an amount far beyond the annual amount

[16] [1958] 1 W.L.R. 108 at 111.
[17] *Second Permanent Supplement* to 25th ed., Vol. I, p. 71.
[18] See s. 8 (4).
[19] s. 8 (2) (*a*) (i).

attributable to interest and sinking fund on the improvements (as may happen if the improvements release potential value in the farm) the arbitrator is to disregard not merely the annual equivalent of the cost of the improvements but the consequential increases in letting value.

(b) An increase in rental value due to improvements executed by the landlord, in so far as he has received or will receive an Exchequer grant in respect of them.[20]

(c) The relief from payment of rates granted by Part V of the Local Government Act, 1929, to occupiers of agricultural hereditaments. There is no English authority on the true interpretation of this rather difficult provision, but the Scottish Court of Session held, in the case of *Guthe* v. *Broatch*,[21] on the corresponding Scottish provision, that it did not mean that the arbitrator should ignore the whole matter; it meant that he should make whatever *adjustment* in favour of the tenant is required to ensure that the rent is the proper one on the footing that the relief mentioned has not been given. In other words, the direction that the arbitrator is not to take into account the relief from payment of rates means that the fact that the tenant is not liable to pay rates is to be disregarded. This means that the tenant is to be assumed to be liable to pay rates, with the result that his capacity to pay rent will be correspondingly reduced. The arbitrator must thus fix a lower rent than he otherwise would, in the absence of this direction. Although the general comments of the Court of Session on the rent properly payable are no longer applicable since the 1958 Act, the decision on the rates relief point holds good. It is submitted, with respect, that the decision on this point is correct and would be followed in England. A curious little point of interpretation was mentioned by Lord Sorn in *Guthe* v. *Broatch*. He pointed out that it could be argued that as the paragraph refers only to the relief given by the 1929 Act, not the relief given by the Agricultural Rates Acts, 1896 and 1923, it means that the relief which is not to be taken into account (*i.e.*, for which adjustment is to be made) is merely the *additional* relief given by the 1929 Act, namely, relief in respect of rates on one-quarter of the net annual value of the land, on the full net annual value of the buildings (other than the farmhouse and cottages) and on a proportion of the farmhouse and

[20] s. 8 (2) (*a*) (ii).
[21] 1956 S.C. 132.

cottages (a proportion representing the relief due to the limitation of the gross value of an agricultural dwelling-house by section 72 of the Local Government Act, 1929). Lord Sorn expressly reserved the question whether this view is correct. It is submitted that it is not. Although the 1929 Act completed a process of relief which had begun in earlier Acts, section 67 of that Act in terms grants complete exemption. The earlier provisions granting partial relief are now mere history and anyone who needs to convince a rating authority that it is wrong in attempting to extract rates from him in respect of agricultural land would only require to quote section 67 of the 1929 Act. The answer seems, therefore, to be that the arbitrator has to assume that the tenant is liable to pay full rates, although in fact (apart from the farmhouse and cottages) he pays none, and to determine the rent on this basis. The application of this provision in practice presents difficulties and the extent to which it is in fact applied is somewhat doubtful.

(d) The arbitrator is directed not to fix the rent at a lower amount by reason of dilapidations, deterioration or damage caused or permitted by the tenant.[22] This does not appear to be confined to acts or omissions which are breaches of contract, but the contrary view is taken in the leading Scottish textbook on agricultural holdings.[23]

Statement of case for a rent arbitration

As in all cases where arbitration takes place under the Agricultural Holdings Act, 1948, the parties are required by paragraph 6 of the Sixth Schedule to the Act to deliver to the arbitrator within fourteen days of his appointment a statement of their respective cases with all necessary particulars. The arbitrator has no power to extend this time limit, although if the statement and particulars are delivered in time, the arbitrator may allow amendments or additions later. No actual form of statement is prescribed. It is desirable that a copy of the tenancy agreement and a plan of the holding should be attached to the statement. It is suggested that the statement should be fairly full and should refer to the parties' contentions although it should not, of course, attempt to set out evidence. If it is proposed to rely on evidence of rents paid for comparable holdings, this should be stated and the holdings identified. Although the formal rules of pleading do not apply to it, a

[22] s. 8 (2) (*c*).
[23] See Connell's *Agricultural Holdings (Scotland) Acts*, 4th ed., p. 130.

statement should be framed in accordance with the basic principles of a pleading.

Upper and lower limits of award

The question is sometimes asked whether an arbitrator in the exercise of his expert judgment may properly fix the rent at a higher figure than the landlord has asked for, or at a lower figure than the tenant has expressed his willingness to pay. Some arbitrators take the view that as they are themselves expert valuers they are entitled to go outside these limits if they think that the parties have restricted themselves too much. It is submitted, however, that on general principles the arbitrator should not go outside the parties' limits. As Somervell L.J. said in *Ellerby* v. *March*,[24] "the general principle on which all courts and tribunals found their jurisdiction is that they deal with matters which the parties bring before them."

Frequency of revision by arbitration

The revision of rent under the arbitration procedure may not take place more frequently than at three-year intervals, and, in contrast with section 6 of the 1948 Act, a demand cannot be made under section 8 so as to vary the rent within three years from the commencement of the tenancy. The three years' bar operates from the date of a previous increase or reduction, whether made by agreement or by award under section 8, or from the date of a previous "no change" award, but not a negotiated standstill. The three years' bar does not apply after variations of rent made under section 7 (3) in consequence of awards under sections 5 or 6 of the 1948 Act; after increases made under section 9 in respect of improvements; after reductions consequential upon the reduction of the size of the holding; or in certain transitional cases under the 1958 Act.[25]

Stamp duty

No stamp duty is payable on awards, with the result that if the rent is increased by the award the increase will not attract stamp duty. As mentioned above, however, if the increase is made by agreement, as distinct from award, stamp duty is payable on the basis of the difference between the old and new rents.[26]

[24] [1954] 2 Q.B. 357 at pp. 363–364.

[25] See s. 10 (7) and para. 4 (4) of the Fourth Schedule. Also see para. 5 of the Fourth Schedule.

[26] See s. 77 (5) of the Stamp Act, 1891.

Statutory right to increase rent for improvements

In certain cases the landlord is given an absolute statutory right to an increase of rent where he has carried out an improvement which increases the rental value of the holding. These cases are laid down by section 9 of the 1948 Act. The landlord does not need to go to arbitration to secure the increases in these cases, but arbitration is available in the event of a dispute. It is a condition precedent to such increases that the landlord should have served a notice in writing on the tenant requiring the increase within six months of the improvement. An improvement for the purpose of section 9 need not be one of a kind which attracts compensation under the Act, but it must fall within one of the following categories:

(a) Improvements carried out at the request of, or in agreement with, the tenant. An improvement carried out by the landlord in pursuance of a direction given by the Agricultural Land Tribunal under section 4 of the Agriculture Act, 1958, or carried out by the tenant and the cost subsequently recovered from the landlord because of the latter's failure to comply with the direction, is to be treated in the same way as one carried out at the tenant's request.[27]

(b) Drainage works begun, but not completed by the landlord before March 1, 1948, under section 3 (3) of the Agricultural Holdings Act, 1923.

(c) Improvements carried out in pursuance of a notice served by the landlord under section 50 (3) of the 1948 Act.

(d) Improvements carried out by the landlord in pursuance of a statutory direction.

(e) Improvements carried out in accordance with a provision in a livestock-rearing land improvement scheme approved under the Hill Farming Act, 1946, as amended by the Livestock Rearing Act, 1951, being a provision included in the scheme at the instance or with the consent of the tenant.

(f) Works for the supply of water to the holding, executed in pursuance of directions under the Defence Regulations, or of a scheme approved for the purposes of section 15 of the Agriculture (Miscellaneous War Provisions) Act, 1940, as amended by subsequent legislation.

Where the landlord has received an Exchequer grant in respect of any improvements which qualify for an increase of rent, the increase allowed must be *pro tanto* reduced.

[27] s. 4 (5) of the Agriculture Act, 1958.

Miscellaneous points on agricultural rents

Meaning of rent "due"

A well-known broadcaster has recently expressed the view that the word "due" in section 24 (2) (*d*) of the 1948 Act does not imply that the rent had actually become due at the date of the preliminary notice, but that the paragraph is satisfied in this respect if the rent is to become due subsequently. It is difficult to agree with this view. Section 24 (2) (*d*) brackets together rent due and a breach of a term of the tenancy. The breach must have arisen before the preliminary notice is served and it is submitted that, by analogy, the rent must have become in arrear. The two matters are treated as on precisely the same footing. Further, a very odd situation could arise if the preliminary notice could be served in respect of rent not yet due at the date of service. If this view were correct, the preliminary notice could be served in respect of rent which would fall due a day or two before the two months' period mentioned in section 24 (2) (*d*) had expired. As soon as the two months had expired, a notice to quit, excluding security of tenure, could be served. This means that two or three days' delay in paying an instalment of rent could have fatal results for the tenant—a consequence which is contrary to the tendency of all modern legislation. It is, therefore, submitted that the rent must actually be due before the preliminary notice referred to in section 24 (2) (*d*) is served, if the machinery for serving a notice to quit which excludes security of tenure is to be utilised.

Penal rents

At one time it was not uncommon to find in agricultural tenancy agreements stipulations for increased rents to be paid if, say, permanent pasture was ploughed up or other breaches of covenant took place, such as selling off produce, departing from a particular system of cultivation, felling timber, burning heather, and so on. There were numerous decisions which distinguished a penalty proper, against which the tenant could obtain relief, from liquidated sums, which were enforceable. The 1948 Act, however, completing a process which had begun under earlier legislation, provided in section 15 that, notwithstanding anything in a contract of tenancy of an agricultural holding rendering a tenant liable to pay a higher rent or other liquidated damages in the event of a breach, the landlord shall not be able to recover more than the damage actually suffered by him. The result is that penal rent clauses are not nowadays included in agricultural tenancy agreements.

Rents of county council smallholdings

The special formula for determining the rent of a county council smallholding contained in section 52 (2) of the Agriculture Act, 1947, has not been repealed and it would therefore appear that this special formula, and not the general formula in section 8 of the 1948 Act as amended by section 2 of the 1958 Act, continues to apply to such smallholdings, notwithstanding the fact that they may be " agricultural holdings." This is in accordance with the principle *generalia specialibus non derogant.* Section 52 (2) of the 1947 Act provides that " Every letting of a smallholding by the authority shall be at a full fair rent, that is to say, at such rent as a tenant might reasonably be expected to pay for the smallholding if let as such on the terms (other than terms as to rent) on which it is in fact let." In practice the application of this general formula may result in many cases in the same rent as the application of the general formula, but the wording is different and it is not clear that the result would always be the same.

Apportionment of rent

The subject of apportionment of rent (not in respect of time but in respect of estate) is more suitably dealt with in connection with the severance of the reversion and it is therefore postponed until a later article.

THE OFFICE OF CUSTODIAN TRUSTEE

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The Public Trustee Act, 1906,[1] not only set up the Public Trustee as a corporation sole capable of undertaking (save in the case of religious or charitable trusts) the function and office of an ordinary trustee, but also, by section 4, provided for the appointment of a custodian trustee. It is frequently very convenient to appoint a custodian trustee, but it is the writer's experience that the existence of the office is not widely known and that, even when it is known, the powers, duties and limitations attached to it are quite often not understood. Doubtless this is at least in part due to the fact that there is not much law on the subject and that what there is is not altogether clear.

Who may act as Custodian Trustee

Subsection (1) of section 4 of the Act provides that, subject to rules made under the Act, the Public Trustee may, if he consents, be appointed custodian trustee of any trust, but this is subject to the prohibition contained in subsection (5) of section 2 of the Act whereby the Public Trustee may not accept (in any capacity) any trust exclusively for religious or charitable purposes. The expression "religious *or* charitable purposes" is curious in view of the fact that trusts for the advancement of religion constitute one of the categories of charitable trusts: but not every trust for "religious purposes" (using the phrase in its non-legal connotation) is charitable at law, and presumably the prohibition extends to those which are not charitable as well as those that are. Subsection (3) of section 4 provides that the provisions of the section shall apply in like manner as to the Public Trustee to any banking or insurance company or other body corporate entitled by rules made under the Act to act as custodian trustee. Rules have been duly made, under section 14 of the Act: the rule particularly concerned with the office of custodian trustee is rule 30 of the Public Trustee Rules, 1912,[2] substituted by the Public Trustee (Custodian Trustee) Rules, 1926,[3] as amended and added to by further Rules.[4]

[1] References herein to "the Act" relate to the Public Trustee Act, 1906.
[2] S.R. & O. 1912, No. 348.
[3] S.R. & O. 1926, No. 1423.
[4] S.R. & O. 1941, No. 1534, S.I. 1948, No. 2188, and S.I. 1957, No. 2201.

Para. (1) of rule 30 provides that any corporation constituted under the law of the United Kingdom or any part thereof having a place of business there and empowered by its constitution to undertake trust business, and being either (a) a company incorporated by special Act or Royal Charter, or (b) a company registered (whether with or without limited liability) under the Companies Acts having a capital (in stock or shares) for the time being issued of not less than £250,000, of which not less than £100,000 shall have been paid up in cash, or (c) a company registered without limited liability under the Companies Acts whereof one of the members is a company within any of the classes hereinbefore defined, shall be entitled to act as a custodian trustee. The "United Kingdom" means Great Britain and Northern Ireland[5]: but it must be observed that the Act does not extend to Scotland or Ireland and it follows that the office of custodian trustee, within the meaning of the Act, does not exist outside England and Wales. From this it seems to follow that an appointment of an English corporation as custodian trustee of a trust whereof the proper law is Scottish or Northern Irish is ineffective: yet a Scottish or Northern Irish corporation may apparently be appointed to act as custodian trustee of an English trust—an anomaly which is, to say the least, a little strange. "Trust business" in para. (1) is defined by para. (3) to mean the business of acting as trustee under wills and settlements and as executor and administrator.

Para. (1A) empowers the Solicitor for the Affairs of Her Majesty's Treasury to act as a custodian trustee. Para. (2) provides that any corporation constituted under the law of the United Kingdom or any part thereof and having its place of business there, and being either (a) a corporation established for the purpose of undertaking trust business for the benefit of Her Majesty's Navy, Army, Air Force or Civil Service or of any unit, department, member or association of members, of any one or more of those services and having among its directors or members any persons appointed or nominated by the Board of Admiralty, the Army Council, the Air Council or any Department of State or any one or more of those Departments,[6] or (b) a company authorised by the Lord Chancellor to act in relation to any charitable, ecclesiastical or public trusts as a trust corporation, may act as a custodian trustee in relation to such business or trusts.

Paras. (1A) and (2) of rule 30 must be read in conjunction with subsection (1) of section 3 of the Law of Property (Amendment)

[5] para. (3).
[6] The United Services Trustee is such a corporation.

Act, 1926. That subsection defines "trust corporation" to mean the Treasury Solicitor (including the Solicitor for the Affairs of the Duchy of Lancaster), the Official Solicitor, and any person holding any other official position prescribed by the Lord Chancellor; in relation to the property of a bankrupt and property subject to a deed of arrangement, to include the trustee in bankruptcy and the trustee under the deed respectively; and, in relation to charitable, ecclesiastical and public trusts, to include any local or public authority so prescribed,[7] and any other corporation constituted under the laws of the United Kingdom or any part thereof which satisfies the Lord Chancellor that it undertakes the administration of any such trusts without remuneration, or that by its constitution it is required to apply the whole of its net income after payment of outgoings for charitable, ecclesiastical or public purposes, and is prohibited from distributing, directly or indirectly, any part thereof by way of profits amongst any of its members, and is authorised by him to act in relation to such trusts as a trust corporation.

Para. (2A) provides that any Regional Hospital Board, Board of Governors of a teaching hospital or Hospital Management Committee constituted under the National Health Service Act, 1946, shall be entitled to act as a custodian trustee in relation to any trust which such Board or Committee is authorised to accept by virtue of section 59 of that Act. Para. (2B) provides that any Area Gas Board and the Gas Council established under the Gas Act, 1948, or any two or more of them jointly, shall be entitled to act as a custodian trustee in relation to any pension scheme or pension fund established or maintained by any such Board or that Council, or any two or more of them jointly, by virtue of the powers conferred on them by that Act.

The prohibition against the Public Trustee acting as custodian trustee of religious or charitable trusts does not apply to other corporations who are authorised to act as custodian trustee. This was decided by Sargant J. in *Re Cherry's Will Trusts, Robinson* v. *Trustees for Wesleyan Methodist Chapel Purposes.*[8] In practice land and investments held upon charitable trusts are commonly vested in The Official Trustee of Charity Lands or The Official Trustees of Charitable Funds, as the case may be. Neither The Official Trustee of Charity Lands nor The Official Trustees of Charitable Funds are technically custodian trustees, but in practice

[7] For example, a parish council which it is desired to appoint as trustee of a village hall held upon charitable trusts requires the authority of the Lord Chancellor's certificate.

[8] [1914] 1 Ch. 83.

they act as such and do not administer the property which they hold.[9]

Appointment, Powers and Duties of a Custodian Trustee

By virtue of subsection (1) of section 4 of the Act a custodian trustee may be appointed (a) by order of the court made on the application of any person on whose application the court may order the appointment of a new trustee, or (b) by the testator, settlor, or other creator of any trust, or (c) by the person having power to appoint new trustees.

Subsection (2) of section 4 provides that the trust property shall be transferred to the custodian trustee as if he were the sole trustee but that the management of the trust property and the exercise of any power or discretion exercisable by the trustees under the trust shall remain vested in the trustees other than the custodian trustee: to those trustees is given the description of managing trustees. As between the custodian trustee and the managing trustees, and subject and without prejudice to the rights of any other persons, a custodian trustee has the custody of all securities and documents of title relating to the trust property, but the managing trustees are permitted free access thereto and are entitled to take copies thereof or extracts therefrom.

Subsection (2) also provides that a custodian trustee shall concur in and perform all acts necessary to enable the managing trustees to exercise their powers of management or any other power or discretion vested in them unless the matter in which the custodian trustee is required to concur is a breach of trust or involves the custodian trustee in a personal liability in respect of calls or otherwise, but unless the custodian trustee so concurs he is not liable for any act or default on the part of the managing trustees or any of them. In other words the appointment of a custodian trustee in no way deprives the other trustees of their right to the sole management of the trust property, provided that they manage it within the terms of the trust; if, on the other hand, they attempt to commit a breach of trust which could only be committed if the custodian trustee concurred, he acts as an effective brake. The duties of the custodian trustee and the managing trustees are in fact mutually exclusive. This subsection further provides that all sums payable to or out of the income or capital of the trust property are to be paid to or by the custodian trustee, but this is subject to a proviso that he may allow the dividends and other

[9] The Charities Bill provides for an "official custodian for charities." He will combine the offices of The Official Trustee of Charity Lands and The Official Trustees of Charitable Funds.

income to be paid to the managing trustees or to such person as they direct, or into such bank to the credit of such person as they may direct, and in such case he is exonerated from seeing to the application, and is not answerable for any loss or misapplication, thereof.

The power of appointing new trustees, when exercisable by the trustees, is exercisable by the managing trustees alone, but the custodian trustee may apply to the court for the appointment of a new trustee in the same way as any other trustee may so apply. In determining the number of trustees for the purposes of the Trustee Act, 1925, the custodian trustee is not counted.

Remuneration

Subsection (3) of section 4 provides that any body corporate entitled under the Rules to act as custodian trustee may charge and retain or pay out of the trust property fees not exceeding the fees chargeable by the Public Trustee as custodian trustee. Subsection (5) of section 8 provides for the salary or remuneration of the Public Trustee and the Public Trustee's fees are governed by the Public Trustee (Fees) Order, 1957,[10] made under section 9, as amended by section 1 of the Public Trustee (Fees) Act, 1957.

It appears to follow from the fact that the powers and duties of a custodian trustee and of a managing trustee are mutually exclusive that the same corporation cannot effectively be appointed to fill both the office of custodian trustee and at the same time of managing trustee. In such a case, it is simply a trustee for all purposes and that being the case the ordinary rule applies that a trustee cannot charge for his services, save where he is expressly authorised to do so by the founder of the trust, or (as in the case of a custodian trustee) by statute, or (as rarely happens) by order of the court. Thus in *Forster* v. *Williams Deacon's Bank, Ltd.*,[11] the Court of Appeal held that a purported appointment of a bank as both custodian trustee and managing trustee did not give it power to make charges in the first capacity. The deed which purported to appoint the bank to both offices was either wholly invalid in view of the fact that it attempted to appoint one person to two separate and incompatible offices, or it operated to appoint the bank as an "ordinary trustee." The Court of Appeal in *Forster* v. *Williams Deacon's Bank, Ltd.*, did not have to decide which view of the operation of the deed was correct, but it was held by Farwell J. in *Arning* v. *James*[12] that an attempted appointment

[10] S.I., 1957, No. 485.
[11] [1935] Ch. 359.
[12] [1936] Ch. 158.

of a bank as both managing trustee and custodian trustee was ineffective, so that a trustee who attempted to retire was not in fact discharged from his trusteeship. Furthermore, it appears that a corporation which has been appointed as custodian trustee cannot be appointed to fill some other office, such as banker to the trust, and be entitled to charge for its services in that office, except, of course, where the appointments are made by the founder of the trust and he exercises his right to make such provision as he pleases for payment. Although the court normally has an inherent power to order the remuneration of trustees, it appears to be doubtful whether it has power to appoint a bank as custodian trustee and to give it, additional to its statutory power to charge for its work as such, power to make charges as banker to the trust. These views are consistent with such cases as *Crosskill* v. *Bower*,[13] where it was held by Sir John Romilly M.R. that a firm which acted both as trustees and as bankers, and borrowed money from themselves as bankers, were not entitled to retain their banking profits, and *Williams* v. *Barton*,[14] where Russell J. held that a stockbroker's clerk who was also a trustee was not entitled to retain his commission on trust business which he introduced to the firm.

Banking and Trust Corporations

It is not infrequent today for the trust business of a bank to be carried out not by the bank itself but by a separate trust corporation which is controlled by the bank. The question then arises whether the trust corporation, which may only qualify as a trust corporation by virtue of its control by the banking corporation, may properly act as custodian trustee and charge for its services while the bank at the same time acts as banker and charges for so acting. While it is clear that the two corporations are in law separate legal persons, and therefore on the face of it the situation does not arise wherein one person acts as trustee and at the same time derives a profit out of his trust by acting also in another capacity, the rule forbidding a trustee to make a profit out of his trust is a rule of equity established to keep trustees in the straight line of their duty, and it hardly seems consistent with equitable principles that it should be possible to evade the rule by the medium of two artificial persons, separate in law, but the one in fact entirely dependent upon the other. It may, of course, be argued that as the trustee company is controlled by the banking company the trustee does not in fact make a profit out of the trust, but that the bank

[13] (1863) 32 Beav. 86.
[14] [1927] 2 Ch. 9.

makes an indirect profit by reason of the fact that the profits of its subsidiary are increased by the fees which that subsidiary receives under the statute and the rules; though clearly different considerations would arise if the banking company were controlled by the trustee company. It may also be argued that, as the powers of management are entirely in the hands of the managing trustees, it follows that it is for the managing trustees to decide who shall be the banker to the trust, and that if the custodian trustee has in fact no voice in the decision who shall be employed, he is therefore subject to no conflict of duty and interest in relation to the employment. Nevertheless, the writer feels that, bearing in mind the strict view which the law has always taken of the position of trustees, it is undesirable that a controlling company should ever make a profit out of a trust whereof its subsidiary is the custodian trustee, and some support for this view may be derived from *Re French Protestant Hospital*,[15] where Danckwerts J. held that the court was bound, in a case where a corporation was a trustee, to take account of the fact that a corporation existed only according to the rules of law and was not an actual person capable of acting on its own motion in any way whatsoever, and to look at the real situation which existed; those persons who controlled the corporation, and decided what should be done, were as much in a fiduciary position as were trustees in regard to any acts which were done in regard to the corporation and its property.

Lord Chancellor's Certificate

A conflict appears to arise in cases where a corporation acts as custodian trustee under the authority of the Lord Chancellor's certificate obtained under section 3 (1) of the Law of Property (Amendment) Act, 1926. It seems that the certificate will not be granted unless the Lord Chancellor is satisfied that no remuneration will be paid: on the other hand, as has been pointed out above, section 4 (3) of the Act gives every body corporate entitled to act as custodian trustee power to charge. Possibly whether or not a corporation acting under the Lord Chancellor's certificate is entitled to charge or not depends upon the answer to the question whether a custodian trustee administers the trust so that it is a corporation which "undertakes the administration" of a trust within the meaning of section 3 (1) of the Act of 1926. The answer to that question would appear to be in the negative in view of the fact that the custodian trustee has no right to interfere with the managing trustees' powers of management, in which case there would

[15] [1951] Ch. 567.

presumably be no reason why a corporation acting under the Lord Chancellor's certificate solely as a custodian trustee should not charge: but it is submitted that the matter is open to some doubt.

Determination of Trusteeship

Subsection (2) of section 4 of the Act provides that the court may remove a custodian trustee on application being made by the custodian trustee itself or by any of the managing trustees or by any beneficiary provided that the court is satisfied that it is the general wish of the beneficiaries or that it is otherwise expedient that the custodian trusteeship should be terminated. It appears that only the court can terminate a custodian trusteeship: certainly this seems to have been assumed in *Re Squire's Settlement*,[16] where the court on originating motion under section 4 (2) (i) of the Act removed the Public Trustee from his office of custodian trustee of a settlement in order that he might be appointed sole trustee for all purposes.

Advantages of Custodian Trusteeship

Possibly the greatest advantage derived from the appointment of a custodian trustee is the fact that, as the trust property is vested in a corporation, the appointment of new managing trustees can be effected without the attendant trouble and expense—which can be very considerable—of vesting the trust property in them. Likewise changes in investments can be effected simply, though it is to be noted that the choice of investments (within the terms of the trust) rests with the managing trustees. These are very real advantages, and while the circumstances of an ordinary family trust will not normally warrant a division of the duties of trusteeship between a custodian trustee and managing trustees, not infrequently the size of the trust and its probable duration will be such as to make the appointment of a custodian trustee a matter for serious consideration, particularly when it is remembered that, as the custodian trustee is not concerned with management, the appointment in no way deprives the trust of the personal attention to detail which is perhaps the greatest advantage of trusteeship by individuals.

Custodian trusteeship is particularly convenient in the case of trusts which from their very nature are likely to continue in existence for a very considerable time and where the invested funds are large and require constant review and frequent change of investment: pension schemes provide an example. The personal

[16] (1946) 174 L.T. 150.

touch in administration is very necessary, but the vesting of the legal estate in the endowment of the fund in individual trustees is extremely inconvenient: the office of custodian trustee solves the problem.

It is, however, perhaps in the field of charity that custodian trusteeship is of the greatest value, because a charity commonly has a large and fluctuating body of trustees (particularly where there are representative trustees) and it is exceedingly inconvenient, as well as being expensive, revesting the trust property on every occasion when there is a change of trustees. In such a case the obvious course is to vest the trust property in a custodian trustee leaving the management in the hands of the individual trustees. Charity trustees are, moreover, particularly fortunate in having the possibility of vesting the trust property in The Official Trustee of Charity Lands and The Official Trustees of Charitable Funds, who do not charge for their work. Unfortunately, however, it is, in the writer's experience, often extraordinarily difficult to persuade local trustees of the advantage of such vesting and to convince them that it entails no danger of "interference from London," as the management of the trust remains in the hands of the individual trustees.[17]

Other incidental advantages attach to the appointment of a custodian trustee: for example, the custodian trustee, being the person in whom the securities are vested, can conveniently deal with the question of income tax recovery where the trust is one for charitable purposes. In addition there is the safeguard against breaches of trust referred to above—breaches which can often be committed quite unintentionally and which a custodian trustee, with his wide experience, is likely more readily to avoid than are ordinary trustees acting perhaps without legal advice.

[17] In the Charities Bill it is made clear that the Official Custodian for Charities may not exercise powers of management, and the emphasis laid on this limitation of his functions should have salutary effect.

WAYS OF NECESSITY

By J. F. Garner, ll.m., Solicitor

It is perhaps not surprising that the courts are not often called on to adjudicate upon the existence or otherwise of an implied way of necessity in favour of either the grantor or the grantee under a conveyance. Normally, if a "landlocked close," as the old books call the dominant tenement in such circumstances, is conveyed by A to B, or if B retains such a tenement on a sale of the surrounding land to A, B's advisers will be sufficiently alert to ensure that he is entitled to adequate rights of access to his tenement. It will, moreover, be also in A's interests to define the exact nature of the rights to which B is to be entitled, if only so as to avoid future litigation. However, mistakes or omissions are made from time to time, and it is clear that a way will be implied by means of grant or reservation, where the parties have made no provision therefor and the way is necessary for the enjoyment of the dominant tenement. Such a way can be created only over the servient owner's land as grantor, but the dominant tenement need not be surrounded entirely by land of the original grantor (or grantee); a way of necessity will arise if part of the surrounding land is owned by a third person.[1]

Thus, in the famous case of *London Corporation* v. *Riggs*,[2] the plaintiff corporation had purchased land at Chingford (which now forms part of Epping Forest) from the defendant, leaving him with a landlocked close of about two acres in extent. At the time of the conveyance this close was used only for agricultural purposes; the defendant then proposed to erect refreshment rooms thereon, claiming a way of necessity therefor over the land purchased from him by the plaintiff. In the course of his judgment in favour of the plaintiff (who sought to restrain the defendant from so using the way), Jessel M.R. said: "I think it [the way of necessity] must be limited by the necessity at the time of the grant, and that the man who does not take the precaution to secure an actual right of way for all purposes is not entitled to be put in a better position than to be able to enjoy that which he had at the time the grant was made."

[1] *Barry* v. *Hasseldine* [1952] Ch. 835.
[2] (1880) 13 Ch.D. 798.

Where a way of necessity can be claimed, therefore, it will be limited to the circumstances prevailing at the time of the grant, and it must be a case of true necessity. Mere convenience is not the same thing as necessity,[3] nor will such a way be implied where a possible means of access is inconvenient, such as the case where the claimant could have cut a way down through a 20-ft. bank to a public highway below the level of his land.[4] Moreover, the right to exercise a way of necessity will cease when the necessity ends, as, for example, where the dominant owner subsequently acquires some other means of access to his dominant tenement.[5]

Such points are reasonably well established, but as was said in the latest edition of *Gale on Easements*,[6] "the law on the subject is antiquated and, in some respects, not fully developed." Thus, where the need for such a way to be implied can be established, where is it to go, and who is entitled to select the *locus in quo*? Presumably if there is one obvious route which has been used before the severance of the two tenements—by analogy to the "plainly visible road" of *Borman* v. *Griffiths*[7] and *Wheeldon* v. *Burrows*,[8] that will be the natural route for the way of necessity. Where there are several existing physical routes to the dominant tenement, the claimant of the way of necessity is entitled to use one route only, and it seems that the servient owner may select which route may be used.[9] However, if there is any doubt on an express grant of a right of way as to the exact route, the doubt may be settled by the grantor.[10] These rules do not, however, meet every case; for instance, what is the position if there are no existing routes at all? There is authority for saying that in such circumstances the claimant is entitled to a way by the shortest possible route to the nearest public highway.[11] But the "shortest" route may be impeded by some natural or artificial obstacle such as a ravine or a railway line; the dominant owner is certainly expected to make and maintain his own way, but could this include the making of a bridge or a tunnel? In the Roman-Dutch legal system the servient owner is entitled to indicate the route of the

[3] *Aldridge* v. *Wright* [1929] 2 K.B. 117.
[4] *Titchmarsh* v. *Royston Water Co.* (1889) 64 J.P. 56.
[5] See, *e.g.*, *Holmes* v. *Goring* (1824) 2 Bing. 76.
[6] 13th ed. at p. 98.
[7] [1930] 1 Ch. 493 at p. 498, *per* Maugham J.
[8] (1879) 12 Ch.D. 31; and see *Pearson* v. *Spencer* (1861) 1 B. & S. 571.
[9] *Bolton* v. *Bolton* (1879) 11 Ch.D. 968; but see below.
[10] *Deacon* v. *S. E. Ry.* (1889) 61 L.T. 377.
[11] *Osborn* v. *Wise* (1837) 7 C. & P. 761. The existence of such a way depends on an implied grant (or reservation), and therefore there can never be any question of claiming a route over land belonging to a third party. Similarly, it must be shown that the necessity subsisted at the time of the grant; necessity arising subsequently will not do: *Midland Ry.* v. *Mills* (1886) 33 Ch.D. 632.

way, subject to an appeal to the courts if an unreasonable line is selected.[12] Much the same result would, it is submitted, be arrived at by our courts, as the argument that would probably weigh most heavily with them would be that the dominant owner is entitled only to the minimum rights necessary for him to enjoy the dominant tenement for the purposes contemplated[13] by the parties at the time of the grant, but not further or otherwise. On that argument, clearly the servient owner would be a better judge of what was necessary than the dominant owner. However, in *Pennington* v. *Galland*,[14] the dominant owner was allowed to select the most convenient of several possible routes, but it is doubtful whether this case would be preferred to the later case of *Bolton* v. *Bolton* (*supra*), where the decision went the other way.

The next problem is the identity of the persons entitled to exercise such a way of necessity once the existence of the right has been established. In the case of an express grant of a right of way, it is of course customary to specify in the grant the person or persons, or the class of persons, who will be entitled to exercise the rights granted. Such a grant is construed strictly—for example, the grant of a way for the benefit of the "tenants and occupiers" of a defined part of an estate, was held to be insufficient justification for a tenant of another part of the same estate to use the way.[15] On the other hand, a grant of a right of way for the benefit of X and his "assigns" has been held to be sufficient to permit persons licensed by X to use the way[16]; it is suggested in *Gale*[17] that "anyone with the authority of the person entitled to possession of the dominant tenement," may use the way where such user "is not inconsistent with the quantity and purpose of user envisaged by the grant."[18] This general principle may, it is submitted, be applied to ways of necessity by interpreting the "quantity and purpose of user envisaged," as referring to the user that was contemplated by the parties at the time of the grant (or reservation) of the dominant tenement.

12 The writer is indebted to the learned editor of this *Journal* for this information.

13 *London Corporation* v. *Riggs* (*supra*) would suggest that the right must be restricted to the actual purposes for which the dominant tenement was used at the time of the conveyance, but it is clear from *Serff* v. *Acton Local Board* (1886) 31 Ch.D. 679, that the dominant owner is entitled to use the way also for any purposes for which he had acquired the land, provided those purposes were then known to the servient owner. This seems justified by the fact that the implication of a way of necessity is a special application of the general doctrine that a man may not derogate from his grant.

14 (1853) 9 Exch. 1.

15 *White* v. *Leeson* (1859) 5 H. & N. 53.

16 *Mitcalfe* v. *Westaway* (1864) 17 C.B.(N.S.) 658.

17 *Easements*, 13th ed., s. 265.

18 See *Baxendale* v. *North Lambeth Liberal and Radical Club, Ltd.* [1902] 2 Ch. 427, cited in *Gale*.

How does this argument apply in a case where the dominant owner is a corporation (either a local authority or a limited company)? If the corporation as dominant owner can establish an implied grant (or reservation) of a way of necessity, who may exercise that right? Presumably persons authorised by the corporation may do so—their servants, their agents and contractors, and their licensees.[19] In the case of a local authority, the members of the corporate body (the Mayor, Aldermen, or "burgesses"), and in the case of a limited company the shareholders, would not be able themselves to claim to exercise such a right,[20] as they are distinct persons in law from the corporations of which they form part.[21]

Further, in a case where a local authority had acquired a dominant tenement as a beauty spot for the general enjoyment of members of the public as such, without ensuring any public right of access thereto,[22] would the local authority be able to claim a way of necessity for the public across the grantor's land, in view of the expressed purpose of the original acquisition, known to the grantor? Clearly a member of the public desiring to have access to the dominant tenement would not be able to rely on any such implied rights, as he could not plead a private document *inter alios acta*. Moreover, the fact that such a local authority might be in a specially privileged position under statute (*e.g.*, by reason of powers to acquire rights of access compulsorily under the National Parks and Access to the Countryside Act, 1949), would not affect the issue, as the appropriate government department whose sanction would be required to any compulsory rights order might not approve of the implementation of those powers in the particular instance; moreover, the making of an order would give rise under the statute to liability to pay compensation. A claim—successfully established—to a way of necessity gives rise to no liability to compensate the grantor, although of course the grantee will have to make up the surface of the way to his own requirements.[23]

Public rights of way are not treated in English law as if they were mere enlarged private rights of way; different rules apply as to the creation and extinguishment of the two kinds of rights,

[19] How must the existence of the necessary licence be proved? Perhaps a seal is not necessary, this being a matter of trifling or everyday occurrence.

[20] Except in so far as they may have been expressly authorised as licensees, by the local authority or company concerned.

[21] So far as shareholders are concerned, see *R.* v. *Arnaud* (1846) 9 Q.B. 806.

[22] As actually happened recently in the South of England. In that case, the local authority had obtained a limited express right of way which could not be enjoyed by the public; no question of the implication of a way of necessity could therefore arise in the circumstances, as this would involve the illogical implication of a way from a conveyance containing an express grant.

[23] *Osborn* v. *Wise*, *supra*.

and loss of a public right does not necessarily destroy an existing private right of way over the same road.[24] It seems, therefore, that in the case put, the local authority could not claim a public right of way—ways of necessity arise by grant, as we have seen, and public rights of way can arise only by express creation or implied dedication and subsequent acceptance by the public as such.[25]

It should also be noted that although the subject of implied grants or reservations of easements on the grounds of necessity is customarily discussed only within the context of rights of way, and these are by far the commonest of such implied rights, it is possible that other forms of easements may be so created. Thus, on an express grant of an easement, there will be presumed to be granted also any ancillary rights necessary for the enjoyment of the easement—as where a man is granted a right to take water through a pipe across another's land, he will be permitted to have access to the pipe for the purpose of keeping it in repair.[26] Similarly, it has been held that in a grant by the owner of the surface and subjacent strata of land there is to be implied a provision that the surface owner shall have a right not to be damaged by the removal of such support as is necessary to support the surface and the buildings thereon [27] (if any) in the condition in which it is at the time of the grant.[28] Like a way of necessity, a right of support will be implied, however, only in a true case of necessity; the necessity must be one without which the property retained on severance cannot be used at all, not one which is merely necessary to the reasonable enjoyment of the dominant tenement.[29]

It is difficult to contemplate the circumstances in which an easement of necessity could be implied so as to create certain other rights, such as a right to light [30] or to take water or sewage [31] across another's land. Logically speaking, there seems to be no reason why such an easement should not be implied, by way either

[24] *Walsh* v. *Oates* [1953] 1 Q.B. 578.

[25] Strictly, acceptance by the public is merely one of the best forms of evidence of an intention by the owner to dedicate the way: see Lord Kinnear's judgment in *Folkestone Corporation* v. *Brockman* [1914] A.C. 338.

[26] *Pomfret* v. *Ricroft* (1669) 1 Wms.Saund. 321.

[27] Such a right will be implied only in connection with a grant; there can be no question of natural right of support, as this may be enjoyed only in respect of land not encumbered with buildings.

[28] *Richards* v. *Jenkins* (1868) 18 L.T. 437.

[29] *Union Lighterage Co.* v. *London Graving Dock Co.* [1902] 2 Ch. 557.

[30] See *Ray* v. *Hazeldine* [1904] 2 Ch. 17.

[31] Possibly a sewerage authority may acquire land expressly for sewage works, and not provide for any easements by which mains may be laid to the works through lands of the grantor. In these circumstances it would on principle seem to be logical to allow the authority to claim rights of necessity for such mains.

of grant or reservation, in a proper case. Access and support are, however, the two facilities that are clearly essential if a tenement is to be enjoyed at all; rights of water, sewerage, light, telephone wires, etc., however desirable for the amenities of a modern house or factory, are not absolutely necessary for the use of that house or factory, and it is doubtful whether the courts could be persuaded to hold otherwise.

RENTCHARGES IN REGISTERED CONVEYANCING—III

By Theodore B. F. Ruoff, Solicitor

(5) CREATION OF RENTCHARGES OUT OF REGISTERED LAND AND TRANSFERS OF LAND SUBJECT THERETO

Rentcharges Created by Freeholder

The proprietor of a registered freehold estate may, in the prescribed manner, but subject to any entry in the register to the contrary, grant a rentcharge in possession (either perpetual or for a term of years absolute) in any form which sufficiently refers to the registered land which is charged.[1] The title number of the charged land must be referred to and, if part only of the land in a title is affected, the land out of which the rentcharge issues must be described by reference to a plan, unless it can be identified by a verbal reference to a particular part of the filed plan or the Land Registry general map.[2]

The proprietor may also transfer the fee simple in possession of his registered land or any part of it, subject to the reservation thereout of a rentcharge in possession (either perpetual or for a term of years absolute).[3] Again, the exercise of this dispositionary power is subject to there being no entry in the register to the contrary. The transfer may be in any form legally sufficient for the purpose of which the Chief Land Registrar may approve,[4] but it must quote the title number.[5] If a plan is used to describe the part of the land in the title out of which the rentcharge is reserved it must be signed by the transferor and by or on behalf of the transferee.[6] That is to say, in the latter case, the transferee's solicitor may sign it on his client's behalf. He must, of course, identify himself as being that solicitor. A company which "signs" a plan must execute it under seal in accordance with the provisions of its articles of association.[7]

1 Land Registration Act, 1925, s. 18 (1) (*b*).
2 Land Registration Rules, 1925, rr. 79 and 113.
3 Land Registration Act, 1925, s. 18 (1) (*d*).
4 Land Registration Rules, 1925, r. 107 (1). For forms adapted to suit particular circumstances, see p. 699, *et seq.*, *post*.
5 Land Registration Rules, 1925, r. 113.
6 *Ibid.*
7 *Cf. Dartford Union Guardians* v. *Trickett & Sons* (1889) 59 L.T. 754 at p. 759.

Power of Re-Entry: Perpetuity Rule

It is provided in regard to registered land that a perpetual rentcharge in possession may be granted or reserved to any person "with or without a power of re-entry, *exercisable at any time*, on default of payment thereof, or on breach of covenant, and shall have incidental thereto all the powers and remedies (as varied, if at all, by the disposition creating the rentcharge) for recovery thereof conferred by the Law of Property Act, 1925."[8] These remedies are distress, entry for perception of the rents and profits (but not, of course, an absolute power of re-entry) and a demise to a trustee.[9] The words "exercisable at any time" are significant. In regard to unregistered land it is provided by the Law of Property Act that "all rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after the commencement of this Act, be made exercisable by any person and the persons deriving title under him, but, in regard to an estate in fee simple (not being a rentcharge held for a legal estate) only within the period authorised by the rule relating to perpetuities."[10] Although the words in parenthesis suggest that a power of entry for perception, and even an absolute power of re-entry, need no longer be limited to the perpetuity period, the phraseology is not so emphatic as that of the Land Registration Act. Hence it is submitted that in registered conveyancing it is beyond doubt that neither a power of entry for perception nor an absolute power of re-entry is subject to the rule against perpetuities. Anyhow, the rule does not apply to a rentcharge created by way of indemnity against another rentcharge or to powers of distress, entry, or retainer given by way of indemnity.[11]

Rentcharges Created by Leaseholder

The proprietor of a registered leasehold estate may, in the prescribed manner, but subject to any entry in the register to the contrary, grant, to the extent of his registered estate,[12] a rentcharge in possession in any form which sufficiently refers to the registered lease.[13] He may also transfer the registered land or any part of it subject to a reservation to any person of such a rentcharge.[14] The transfer may be made by an instrument in any

[8] Land Registration Act, 1925, s. 18 (2).
[9] Law of Property Act, 1925, s. 121.
[10] *Ibid.* s. 4 (3).
[11] *Ibid.* s. 162 (1).
[12] *Cf. Doe* d. *Garrod* v. *Olley* (1840) 12 Ad. & El. 481, 487; *Jolly* v. *Arbuthnot* (1859) 4 De G. & J. 224, 241.
[13] Land Registration Act, 1925, s. 21 (1) (*b*).
[14] *Ibid.* s. 21 (1) (*c*).

form legally sufficient for the purpose of which the Chief Land Registrar may approve [15] and the previous remarks as to the quotation of the title number and the use of a plan [16] apply equally to this case.

Entry to the Contrary

It will have been observed that the power of the registered proprietor to create a rentcharge is made subject to there being no entry in the register to the contrary.[17] If such an entry exists, steps should be taken to see that it is removed (if such a course is possible) or, in the case of a restriction, that its terms will be complied with, before the transaction is completed and presented for registration. A bankruptcy inhibition is such an entry because it entirely prevents the registration of all dispositions [18]; a creditors' notice suffices to frighten off a proposing rentowner because it may well precede an inhibition.[19] A caution against dealings [20] causes him to call a halt, because the disposition creating the rentcharge cannot be completed by registration until the Registry has served notice upon the cautioner and either he has withdrawn his caution, or has consented to the registration, or, has let the notice go by default, or the Chief Land Registrar has heard and determined the merits of the cautioner's claim and made an order cancelling the caution.[21]

However, the commonest examples of contrary entries consist of restrictions.[22] When a restriction requires the consent of some person or persons to be given to all or any dispositions,[23] its terms must be observed strictly. The presence of any restriction expressly directed against charging or which allows the proprietor to make only certain dispositions which do not include charging, prevents the completion by registration of any disposition creating a rentcharge. The normal company restriction (to the effect that except under an order of the Registrar no charge by the proprietor of the land is to be registered, unless the Registry is furnished with a certificate signed by the secretary, the solicitor, or a director of the company that the charge does not contravene any of the provisions of its memorandum and articles of association) applies

15 Land Registration Rules, 1925, r. 107 (1).
16 See p. 211, *ante*.
17 Land Registration Act, 1925, ss. 18 (1), 21 (1).
18 Land Registration Rules, 1925, r. 180.
19 *Ibid.* r. 179.
20 Under the Land Registration Act, 1925, ss. 54, 55.
21 Land Registration Rules, 1925, rr. 218 to 221.
22 Under the Land Registration Act, 1925, s. 58 and other sections.
23 *Ibid.* s. 58 (1).

directly to the creation of a rentcharge, and its terms must be observed.

When a local authority is registered as the proprietor of land, a restriction is entered precluding the registration of dispositions unless they are made in accordance with the provisions of a stated statute. Normally the statute in question requires the consent of a Minister as a condition precedent to the exercise of dispositionary powers, but the Registry is not concerned to see that any consent has been given,[24] even in those instances in which a consent is still necessary,[25] except in the cases of a parish council or representative body of the parish,[26] or concerning corporate land.[27] It seems, therefore, that, except for these instances, provided the statute referred to in the restriction confers upon the local authority unfettered powers of selling, the restriction will not prevent the registration of a rentcharge created by it on a sale, although its power to create a rentcharge was formerly doubted.[28] But the terms of the particular statute under which the authority is disposing of the land must always be considered carefully.

The normal settled-land restrictions preclude the proprietor, whether tenant for life or statutory owner, from making any disposition unless it is expressly authorised by the Settled Land Act, 1925, or (although it does not so state) authorised by some extended power conferred by the settlement itself.[29] Therefore, as the powers of a tenant for life include the power to sell in consideration of a rentcharge,[30] the normal restriction will not prevent the registration of a disposition which creates a rentcharge in accordance with the statutory regulations. If, however, the settlement excludes these powers, there ought to be a special restriction on the register to prevent the creation and registration of a rentcharge and it is the duty of the persons applying for registration of the settled land to apply for one.[31]

The obligatory joint-proprietorship restriction is directed simply to ensuring that at least two trustees (other than a trust corporation) join in giving a receipt for capital moneys[32] and it does not touch the question of their dispositionary powers. If the joint proprietors are trustees for sale they will possess the same

[24] Town and Country Planning Act, 1959, s. 29 (1). [25] *Ibid.* s. 26.
[26] *Ibid.* s. 22 and Sched. IV, Pt. I.
[27] *Ibid.* s. 30 (6). "Corporate land" is defined in the Local Government Act, 1933, s. 305.
[28] *Cf. Scarborough Corporation* v. *Cooper* [1910] 1 Ch. 68.
[29] Land Registration Rules, 1925, r. 58; Sched., forms 9, 10 and 11.
[30] Settled Land Act, 1925, s. 39.
[31] Land Registration Act, 1925, s. 86 (3); Land Registration Rules, 1925, rr. 56, 57 and 99 to 104.
[32] Land Registration Act, 1925, s. 58 (3).

powers as a tenant for life,[33] including the power to create rentcharges and if, in a particular instance, they are deprived by the trust instrument of that power, it is their duty to ensure that this deprivation is reflected in an appropriate restriction.

Form of Instruments

As indicated already, when the registered proprietor of land grants a rentcharge independently of any transfer of the land, his choice of the form of the deed is limited only by the necessity for him to quote the title number of the charged land,[34] or, if part only of the land in a title is to be charged, for him to identify that part. Consequently it is open to him to use a deed of grant in the customary form if he wishes. Alternatively, the Land Registration Rules provide a form of " charge by way of annuity," the use of which is optional.[35] This form is numbered 46 in the schedule to the Rules but it is not on sale as a printed form. It consists of a grant to the rentowner in perpetuity, or for a term of years, of an annuity or yearly rentcharge of a specified amount to accrue from day to day but to be paid, free from all deductions except income tax, by equal half-yearly or other periodical payments in every year, the first of which is to be made on a stated date, issuing out of the land, together with the powers and remedies for securing and compelling payment conferred by the Law of Property Act, 1925.[36] The land is charged with the payment of the rentcharge and there is a covenant by the grantor with the rentowner to pay it.[37] If desired, the grantor may add covenants as to building and user of the land and confer on the rentowner a power to enter on breach of any covenant. This simple form is satisfactory and effectual for creating a legal rentcharge issuing out of the registered land and is occasionally used. Nevertheless, it leaves the onus on the proposing rentowner of framing all the covenants which he may consider necessary to protect his security[38] and it confers no remedies beyond the statutory ones. If, therefore, the

[33] Law of Property Act, 1925, s. 28 (1).

[34] Land Registration Act, 1925, ss. 18 (1) (*b*); 21 (1) (*b*); Land Registration Rules, 1925, r. 113.

[35] Land Registration Rules, 1925, r. 142; Sched., form 46.

[36] *i.e.*, Law of Property Act, 1925, s. 121.

[37] This gives the rentowner a right of action on the covenant, but even when there is no covenant he will have an action in debt by reason of the landowner's ownership of the freehold estate (*Thomas* v. *Sylvester & Ors.* (1873) L.R. 8 Q.B. 368; and see the Land Registration Act, 1925, s. 69 (1).

[38] Form 12 on p. 699, *post* (which is a transfer in consideration of a rentcharge) contains the kind of covenants that are often in demand and which can be incorporated in statutory form 46.

proposing rentowner requires (for example) an absolute power of re-entry he must add appropriate provisions to the form.[39]

When registered land is transferred in consideration of a rentcharge, the only requirement as to form (apart from identification of the land by its title number and, if necessary, a plan[40]), is that the deed shall be "in any form legally sufficient for the purpose of which the Registrar may approve."[41] The Chief Land Registrar possesses wide powers of allowing necessary alterations and desired additions to the statutory forms[42] and of approving the use of forms which follow the statutory forms as nearly as the circumstances permit when there is no statutory form in existence to suit the facts of the case.[43] Nevertheless, he is empowered to decline to register any instrument which is improper in form or in substance, or is not clearly expressed, or does not indicate with precision the particular interest or land which it is intended to affect, or refers only to matters which are not the subject of registration, or is otherwise expressed in a manner inconsistent with the principles upon which the register is to be kept.[44] In case these prohibitions sound formidable, the practitioner should rest assured that his Land Registry instrument will not be in danger of rejection so long as he does not attempt to draw it in customary conveyancing form, or introduce recitals, or bring equities and trusts, or the past history of the title, into it.

Preparation of Deeds

Although the general and well-known rule is that any stipulation to the effect that the draft conveyance to a purchaser shall be prepared by the vendor's solicitor at the purchaser's expense is void,[45] there is an express saving which, when the only consideration in money or money's worth is the reservation of a perpetual rentcharge, allows the vendor to stipulate in the contract for sale that the draft conveyance shall be prepared by his solicitor at the purchaser's expense.[46] This saving which, it is understood, is generally made use of in the Manchester area, does not apply when there is a money consideration in addition to the creation of the rentcharge. The definition of "conveyance" includes a Land Registry transfer.[47]

[39] Cl. 4 of form 12 on p. 699, *post*, may readily be adapted for the purpose.
[40] Land Registration Rules, 1925, r. 113.
[41] *Ibid.* r. 107 (1).
[42] *Ibid.* r. 74.
[43] *Ibid.* r. 75.
[44] *Ibid.* r. 78.
[45] Law of Property Act, 1925, s. 48 (1).
[46] *Ibid.* proviso.
[47] *Ibid.* s. 205 (1) (ii).

Transfer in Consideration of Rentcharge

In connection with the transfer of land in consideration of a rentcharge (whether or not there is a cash consideration as well), the Rules provide forms which can easily and conveniently be combined. These are the statutory forms 19 or 20,[48] which are, respectively, the normal forms for transferring the whole, or a part of the land in a title, and form 46 for creating a rentcharge, referred to previously.[49] The fusion of form 19 with form 46 presents no difficulty. In the precedents which follow will be found a form [50] of transfer of a building plot, being part of the land in a transferor's title, made in consideration (or partly in consideration) of a perpetual yearly rentcharge and in it the statutory forms 20 and 46 have been combined with the addition of typical covenants to build a dwelling-house, to maintain it in repair, to allow inspection by the rentowner and to permit him to repair in case of a default by the transferee, to insure, and to give notice to the rentowner of a change in ownership. There is also an optional clause giving the rentowner an absolute power of re-entry in cases of default, in addition to the normal statutory remedies. This power is a legal interest [51] but although, if exercised, it drastically brings to an end the freehold estate of the transferee, its existence does not prevent that estate from being a fee simple absolute.[52] As previously stated, the power does not need to be limited with regard to the rule against perpetuities.[53] The transfer creating the power will be referred to in the property register of the rentowner's title [54] and the power itself will attach to the registered estate of the rentowner without being specially mentioned on his registered title.[55] Again, the transfer containing the power will be referred to in the charges register of the transferee's title [56] and this will have the effect of bringing its entire contents on to the register just as if they had been set out verbatim thereon.

In transactions of this kind it is common to grant and reserve easements, such as rights of drainage and rights of way over common side- and back-passageways. These the draftsman may add in appropriate terms. Furthermore, if the transferor wishes to

[48] Land Registration Rules, 1925, r. 98 and Sched., form 20.
[49] See p. 215, *ante*.
[50] See Form 12, p. 699, *post*.
[51] Law of Property Act, 1925, s. 1 (2) (*e*).
[52] *Ibid.* s. 7 (1), as added to by the Law of Property (Amendment) Act, 1926.
[53] Law of Property Act, 1925, s. 4 (3); and the more emphatic provisions of the Land Registration Act, 1925, s. 18 (2).
[54] Land Registration Rules, 1925, r. 5 (2). As to the creation of a rentcharge title, see p. 226, *post*.
[55] Land Registration Act, 1925, s. 20 (1).
[56] Land Registration Rules, 1925, r. 107 (2).

impose restrictive covenants for the benefit of his retained land, he may do so, but he must take care not to lump together these covenants and the positive covenants for the preservation of the security, because the person for the time being having the benefit of the restrictive covenants will not necessarily be the rentowner. The restrictive covenants do not touch and concern [57] the rentcharge, so that the benefit of them cannot run with it at law,[58] and "the conception of the benefit of a covenant running at law with land in which the covenantee had no estate or interest at the date of the covenant is surely an impossible one, and equally so, if his only estate or interest is as an assign of a rentcharge." [59] And, again: "I cannot see on what equitable principle, land to which the benefit of a covenant cannot be attached at law, because the land belongs at the time to a total stranger to the covenant, can in a court of equity be treated as land to which the benefit of such a covenant can be attached in equity." [60] The restrictive covenants, in short, are intended to benefit and are only capable of benefiting the transferor's retained land, not the rentcharge.[61] Indeed, it is open to doubt whether the benefit of a restrictive covenant can effectively be annexed to a rentcharge.[62]

Transfer of Part Apportioning Existing Rentcharge

The Rules recognise [63] that landowners will wish to transfer freehold land subject to an existing rentcharge because they refer to the covenants which will be implied in the instrument governing the transaction, but beyond that they give no guidance about the form of the instrument to be used. As regards leasehold land, however, two forms of transfer are provided, and one of them (being the statutory form 33) deals with the position where there has already been an informal or a formal apportionment of the ground rent payable under a lease, and the other (form 34) which informally apportions the ground-rent on the occasion of the transfer.[64] These instruments help the practitioner in his choice of a form to be used in comparable transactions concerning rentcharges. Thus, when the whole of the land in a registered title is sold subject to an existing apportionment of a rentcharge, it is only necessary to combine the normal form of transfer (form 19) with

[57] *Cf. Austerberry* v. *Oldham Corporation* (1885) 29 Ch.D. 750, 776.
[58] *Haywood* v. *Brunswick Building Society* (1881) 8 Q.B.D. 403.
[59] *Per* Clauson J. in *Torbay Hotel, Ltd.* v. *Jenkins* [1927] 2 Ch. 225, 239.
[60] *Ibid.* at p. 240.
[61] *Cf. Re Union of London and Smith's Bank, Ltd.'s Conveyance*: *Miles* v. *Easter* [1933] Ch. 611.
[62] *Torbay Hotel, Ltd.* v. *Jenkins*, *supra*.
[63] Land Registration Rules, 1925, r. 109.
[64] *Ibid.* r. 115; Sched., forms 33, 34.

form 33. This is so simple a process that it does not require exemplification in the precedents.

When part of the land in a title is sold subject to an existing rentcharge, which is apportioned for the first time by the transfer, a combination of Land Registry forms 20 and 24 provides the desired instrument, and in the accompanying precedents a form is provided which effects this fusion with certain modifications and variations.[65] The land is transferred to the purchaser for a cash consideration subject to a specified part of the rentcharge and there are declarations that the land transferred and the land retained by the transferor shall stand charged with specified sums. These declarations bring into operation the remedies of distress and entry for perception of rents and profits in default of payment of the equitably apportioned sums in pursuance of the provisions of the Law of Property Act, 1925, which are as follows[66]:

> " (1) Where in a conveyance for valuable consideration, other than a mortgage, of part of land which it affected by a rentcharge, such rentcharge or a part thereof is, without the consent of the owner thereof, expressed to be . . . apportioned between the land conveyed or any part thereof, and the land retained by the grantor or any part thereof; then, without prejudice to the rights of the owner of the rentcharge, such charge or apportionment shall be binding as between the grantor and the grantee under the conveyance and their respective successors in title.
>
> " (2) Where—
>
> (*a*) any default is made in payment of the whole or part of a rentcharge by the person who, by reason of such charge or apportionment as aforesaid, is liable to pay the same; or
>
> (*b*) any breach occurs of any of the covenants (other than in the case of an apportionment the covenant to pay the entire rentcharge) or conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land retained or conveyed, as the case may be;
>
> the owner for the time being of any other land affected by the entire rentcharge who—
>
> (i) pays or is required to pay the whole or part of the rentcharge which ought to have been paid by the defaulter aforesaid; or

[65] See form 13, p. 703, *post*.
[66] Law of Property Act, 1925, s. 190 (1), (2).

(ii) incurs any costs, damages or expenses by reason of the breach of covenant or condition aforesaid;

may enter into and distrain on the land in respect of which the default or breach is made or occurs, or any part of that land, and dispose according to law of any distress found, and may also take possession of the income of the same land until, by means of such distress and receipt of income or otherwise the whole or part of the rentcharge (charged or apportioned as aforesaid) so unpaid and all costs, damages and expenses incurred by reason of the non-payment thereof or of the breach of the said covenants and conditions, are fully paid or satisfied."

The definition of "conveyance"[67] includes[68] a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will and is thus amply sufficient to embrace a Land Registry transfer so as to attract the provisions quoted above.

Implied Covenants

The precedent form of transfer contains an express declaration (which may be negatived or modified, if desired) implying covenants by both parties to pay the apportioned sums and to observe and perform the covenants in the deed creating the rentcharge and mutual cross-charges covering all such sums as may become payable under the implied covenants.[69] In case the reader questions the need for this express declaration, it should be explained (as will appear hereafter) that the relevant provisions of the Land Registration Rules contain an inconsistency which makes it desirable for the careful draftsman to adopt this course.

The covenants in question are those implied under section 77 of the Law of Property Act, 1925, which states that they shall be implied as follows[70]:

"In a conveyance for valuable consideration, other than a mortgage, of part of land affected by a rentcharge, subject to a part of that rentcharge which has been or is by that conveyance apportioned (but in either case without the consent of the owner of the rentcharge) in respect of the land conveyed:

[67] *Ibid.* s. 205 (1) (ii).
[68] See *Robinson* v. *Barton-Eccles Local Board* (1883) 8 App.Cas. 798 at p. 801: *Re Gates* [1930] 1 Ch. 199 at p. 202.
[69] See clauses 3 & 4 of form 13, p. 703, *post*.
[70] Law of Property Act, 1925, s. 77 (1) (B); Sched. II, Pt. VIII.

"(i) A covenant by the grantee of the land or joint and several covenants by the grantees, if more than one, with the conveying parties and with each of them, if more than one . . . that the grantees, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, pay the apportioned rent and observe and perform all the covenants (other than the covenant to pay the entire rent) and conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land conveyed:

"And also will at all times, from the date aforesaid, save harmless and keep indemnified the conveying parties and their respective estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the said apportioned rent, or any breach of any of the said covenants and conditions, so far as the same relate as aforesaid.

(ii) A covenant by a person who conveys or is expressed to convey as beneficial owner, or joint and several covenants by the persons who so convey or are expressed to so convey, if at the date of the conveyance any part of the land affected by such rentcharge is retained, with the grantees of the land and with each of them (if more than one) . . . that the conveying parties, or the persons deriving title under them, will at all times, from the date of the conveyance or other date therein stated, pay the balance of the rentcharge (after deducting the apportioned rent aforesaid, and any other rents similarly apportioned in respect of land not retained), and observe and perform all the covenants, other than the covenant to pay the entire rent, and conditions contained in the deed or other document creating the rentcharge, so far as the same relate to the land not included in the conveyance and remaining vested in the covenantors:

"And also will at all times, from the date aforesaid, save harmless and keep indemnified the grantees and their estates and effects, from and against all proceedings, costs, claims and expenses on account of any omission to pay the aforesaid balance of the rentcharge, or any breach of any of the said covenants and conditions so far as they relate as aforesaid."

It will be observed that in unregistered conveyancing the grantee's covenants are implied completely automatically. Those on the part of the grantor can only be imported by his being expressed to convey "as beneficial owner," thus implying also the usual covenants for title.[71] If, however, the grantor is a trustee

[71] Under *ibid.* s. 76 (1) (A); Sched. II, Pt. 1.

or personal representative or other person who proposes to give only the limited covenants for title which are implied by his conveying "as trustee" or "as personal representative" (and so forth) he must, in order to imply also the covenants, set out above, relating to the apportioned rentcharge, expressly refer to section 77 of the Law of Property Act in his conveyance.[72]

Turning to the position in registered conveyancing, the particular rule which governs the situation under discussion[73] provides that "on a transfer of freehold land subject to an existing rent, covenants (similar to those implied by section 24 of the Act on a transfer of leasehold land) shall be implied under section 77 of the Law of Property Act, 1925, but such implication may be negatived by adding suitable words to the instrument of transfer . . ." This is not elegant draftsmanship and, besides, its meaning appears to be undermined by another rule[74] which deals with the subject of implied covenants thus:

"Provided that where covenants are to be implied under section 77 aforesaid, with or without modification, express reference shall be made in the disposition to that section or to the Parts of the Second Schedule to [that] Act in which the covenants are set out."

The same rule states that "the provisions of this rule are in addition to and not in substitution for the other provisions relating to covenants contained in the said Act." In view of these inconsistencies it appears to be desirable to state in the instrument of transfer in every instance that the covenants implied under section 77 of the Law of Property Act, 1925, are to be implied in the deed, whether the transferor is expressed to transfer "as beneficial owner" or "as trustee" (or otherwise, as the case may be). This course has been adopted in the precedents.

Formal Apportionment

When a purchaser buys part of the registered land affected by a rentcharge subject to a proportion of it, the only way in which he can achieve complete protection against a liability to pay no more than that proportion is to obtain a formal (or legal) apportionment of the rentcharge, for, unless this is done, the rentowner may have recourse to any part of the land and recover out of it the entire sum.[75] It is rarely possible to adopt this course in practice

[72] *Ibid.* s. 77 (4).
[73] Land Registration Rules, 1925, r. 109.
[74] *Ibid.* r. 77 (4).
[75] *Christie* v. *Barker* (1884) 53 L.J.Q.B. 537 at p. 543. *Cf. Woodcock* v. *Titterton* (1864) 12 W.R. 865.

for it involves the concurrence of the rentowner in order that he may release the land transferred from an agreed portion of the rentcharge. This he is often unwilling to do. However, there is no legal difficulty about this procedure because it is provided by statute that a release from a rentcharge of part of the land charged therewith does not extinguish the whole rentcharge, but operates only to bar the right to recover any part of the rentcharge out of the land released, without prejudice to the rights of any persons interested in the land remaining unreleased, and not concurring in or confirming the release.[76]

A precedent is provided [77] of a transfer of part of the land in a title subject to a rentcharge which is formally apportioned.

Exoneration of Land from Overriding Rentcharge

In addition to transfers which effect apportionments, there are two other types of transaction involving an existing rentcharge which are fairly common. In one, the land transferred is freed (as between the parties) from the overriding rentcharge; in the other, the land retained by the transferor is freed similarly.

Sale at an Improved Rent

In the former kind of transaction, a part of the land which is subject to an overriding rentcharge is transferred in consideration of an improved rentcharge and the overriding rentcharge is charged exclusively upon the transferor's retained land in exoneration of the land transferred.[78] One effect of exonerating the land transferred from the entire rentcharge is that if the transferee is in the future called upon to pay any part of it or he incurs any expense by reason of the transferor's default, he is entitled to exercise powers of distress and entry for perception of rents and profits over the land which, at the time of the exoneration, the transferor then retained.[79] Incidentally, in addition to the transferor transferring "as beneficial owner" it is advisable, for the reasons given previously,[80] that the implied covenants on his part to pay the entire sum [81] should be imported by an express reference in the transfer to the provisions of section 77 of the Law of Property Act. It is noteworthy that the benefit of both remedies and covenants runs with the land of the transferee so that his successors in title will

[76] Law of Property Act, 1925, s. 70 (1), re-enacting the effect of the Law of Property Amendment Act, 1859, s. 10.
[77] See form 14, p. 705, *post*.
[78] See form 15, p. 707, *post*.
[79] Law of Property Act, 1925, s. 190 (1) (*b*), (2).
[80] See p. 222, *ante*.
[81] Law of Property Act, 1925, s. 77 (2) (ii).

enjoy the benefit of them without any express assignment of them.[82]

In addition to these protections against his liability to be proceeded against for the overriding rentcharge, it is usual for the transferee to be given also a power of retainer, enabling him to reimburse himself out of the second rentcharge.[83] In other words, instead of distraining against the transferor's retained land (which may anyhow have passed into other hands, although that does not prevent the exercise of a power of distress against it), he is given an express power to withhold payment of the rentcharge created by him in favour of the transferor in satisfaction of the liability he incurs. It will be appreciated that the transferor's rentcharges (created by the transfers to the transferee) will usually be of a greater aggregate amount than the overriding rentcharge, because the process of improvement involves a series of transactions by which, finally, the land is made to yield a greater sum than formerly. An example may clarify the position. A transferor owns land subject to a rentcharge of £15 and he proposes to divide it into five plots and sell each of them in consideration of an improved rentcharge of £8. On the transfer of plot 1 the transferee is given the statutory remedies against plots 2 to 5, and, in case he is called upon to pay any part of the £15 rentcharge, he is given express power to withhold payment of the £8 rentcharge payable to his transferor. The sale of plot 2 follows similar lines except that the transferor is no longer in a position to confer remedies against plot 1 upon the transferee. Similarly, on the sale of plots 3 and 4, there is a diminishing scope for the remedies of the transferees. When the transferor comes to sell plot 5, the entire overriding rentcharge of £15 will be informally charged upon it. This may well be too great a sum for it reasonably to bear, so that it is quite usual for the transferor to agree to sell to the transferee, for an agreed sum, the four improved rentcharges of £8. If this is done he will receive a sum of £32 out of which to pay the rentcharge of £15, and there will be conferred upon him by way of profit a net annual sum of £17.

Occasionally, the transferee is given, either additionally, or in the alternative, a power to collect the newly created rentcharges from other plots[84] but, seeing that, apart from a special provision, he could not enforce the power of collection against other (former) transferees, it is necessary for the transferor to give him, for the purpose of collection, an irrevocable power of attorney.[85]

[82] *Ibid.* ss. 77 (5), 189 (2).
[83] See clause 6 of form 15, p. 709, *post.*
[84] See clause 7 of form 15, p. 710, *post.*
[85] See the Law of Property Act, 1925, ss. 126 and 128.

Overriding Rentcharge Charged on Land Transferred

A vendor whose land is subject to a rentcharge sometimes wishes to sell the individual plots or houses free from it. He cannot, of course, sell all his land so free, even by means of an equitable exoneration. Yet, what happens in a typical case is that he transfers all the charged land save for one plot or house free from the rentcharge, so that the single remaining house or plot stands equitably charged with the entire sum. He may sell the last area either for a cash consideration, or in consideration of an improved rentcharge, or both. In order to carry out such a scheme the vendor needs only to charge the entire rentcharge upon one unit in exoneration of all the others. If this is done, the statutory covenants by the transferee for payment and for indemnity [86] and the statutory powers of distress and entry for perception of rents and profits [87] will automatically be implied in the deed. The benefit of these covenants and powers devolve, without express assignment, upon the transferor's successors in title.[88] A precedent of a transfer of part of the land in a registered title carrying out these objects has been provided.[89]

Searches

In carrying out any of the transactions previously described, there are certain searches that the purchaser's solicitor must make for the proper protection of his client and himself. There are other searches that he need never make.

It is never necessary, despite the misleading *obiter dicta* in one case,[90] for him to make a search in reference to the registered land at Kidbrooke under the Land Charges Act, 1925 [91] unless, indeed, the vendor's title is a possessory or a qualified one, in which case he must, in regard to the pre-registration title, make such searches as he would normally make in unregistered conveyancing.[92] It is never necessary for him to search at the Companies Registry at Bush House [93] or, in regard to registered land in Yorkshire, in the registries in any of the Ridings.[94]

[86] *Ibid.* s. 77 (1) (B) (i); Sched. II, Pt. VIII; and *ibid.* s. 77 (2) (i).
[87] *Ibid.* s. 190 (1) (*a*), (2).
[88] *Ibid.* ss. 77 (5), 189 (2)
[89] See form 16, p. 711, *post.*
[90] In *City Permanent Building Society* v. *Miller* [1952] 2 All E.R. 621 at p. 626. For the fallacies inherent in these *obiter dicta*, see Curtis & Ruoff's *Registered Conveyancing* at pp. 399 *et seq.*
[91] See the Land Registration Act, 1925, ss. 5, 20 (1), 23 (1), 59 (6), 69 and 110 (7). See also the Land Charges Act, 1925, s. 23 (1).
[92] As a result of the Land Registration Act, 1925, ss. 11, 12, 23, (3), (4) and 70 (1) (*h*).
[93] *Ibid.* s. 60.
[94] *Ibid.* s. 135 (1).

It is, however, essential that he should make the usual searches and inquiries in the local land charges registers because rights there recorded are overriding interests.[95]

It is also essential that he should make an official search by post against the title of the vendor at the Land Registry. There is no charge for this. The request for an official search should be made in printed form 94A if the land to be transferred is the whole, or the residue, of that comprised in the vendor's title, or in form 94B[96] if it is a part of the land in that title, and in either case it must be accompanied by the written authority of the registered proprietor.[97] Not only is the official certificate of the result of the search conclusive,[98] but the obtaining of it exonerates the solicitor making it from responsibility for any loss through an error in it[99] and, in the unlikely event—for it has never yet occurred—of loss being caused by an error in the official search, his client is entitled to be indemnified out of the Land Registry insurance fund.[1]

The official certificate of the result of the search not only reveals the existing state of the registered title authoritatively, but also predetermines what its state will be when the purchaser applies for registration, because any application lodged by any other person after the date of the official certificate, but before the expiration of fourteen working days thereafter, will be postponed to the protected transaction.[2] In order that these benefits may attach to the purchaser's application to register his transfer, however, he must deliver it at the Registry in proper order, in due time, and accompanied by the official certificate of the result of the search.[3]

Completion by Registration

It is fundamental that all interests created by dispositions by a registered proprietor must, in order to be legally effective, be completed by registration "and notice thereof shall also be noted on the register in accordance with this Act."[4] Thus, when a rentcharge is created, there are two processes, namely, the substantive registration of the title to the rentcharge (and of the transferee, in

95 *Ibid.* s. 70 (1) (i); see also s. 3 (ix) and the Land Charges Act, 1925, s. 23 (1).
96 Obtainable from any branch of H.M. Stationery Office.
97 Land Registration Act, 1925, ss. 110 (1), 112. For its form, see a later article.
98 Land Registration Rules, 1925, r. 292.
99 *Ibid.* r. 295.
1 Land Registration Act, 1925, s. 83 (3).
2 Land Registration Rules, 1925, r. 1, as amended by the Land Registration Rules, 1936, r. 1.
3 Land Registration Rules, 1930, r. 1.
4 Land Registration Act, 1925, s. 19 (2). There are parallel provisions governing terminable rentcharges issuing out of leasehold land in *ibid.* s. 22 (2).

the case of a transfer in consideration of a rentcharge), and the entry of notice of the rentcharge as an incumbrance against the title of the landowner. Until these processes have been completed the transactions take effect only in equity. In the case of a transfer made in consideration of a rentcharge, the transferor is registered as the proprietor of the rentcharge under a separate title, and is given a rentcharge certificate.[5] Simultaneously, the transferee is registered as the proprietor of the land, and the rentcharge is noted in the charges register of his title as an incumbrance.[6] In the remarks column of the entry there will be a cross-reference to the rentcharge title.[7] The disposition, when registered, takes effect as a registered disposition.[8]

Another effect of the completion of a disposition by registration is that thenceforth the benefit of the implied covenants becomes annexed and incident to the registered proprietorship so as to be enforceable by the proprietor for the time being.[9] But if, in a transfer, these covenants are expressed to be negatived or modified, a note of the fact will be entered on the proprietorship register of the transferee's title.[10]

Documents to be Lodged: Deed of Grant

When a rentcharge is created out of registered land by an instrument in form 46 or a deed of grant in conventional form, the following documents should be posted to the Registry by the grantee within fourteen working days of the date of the official certificate of the result of the search against the title of the grantor:

(1) The original deed of grant. This does not require a "produced" stamp.[11] There is no point in having the deed executed in duplicate because, after completion by registration, this original deed will be reissued to the rentowner as part of his title and the register will indicate that this has been done, whilst the landowner will receive an office copy of it.

(2) Two certified copies of the deed. These will be made by the Registry into office copies (which are admissible in evidence to the same extent as the original [12]), one being filed, and the other being bound into the land certificate of the owner whose land is charged. Certification should be made in the firm name, not by clerks using their own names.

(3) The official certificate of the result of the search.[13]

[5] Land Registration Rules, 1925, r. 108.
[6] *Ibid.* r. 107 (2).
[7] *Ibid.* r. 108.
[8] Land Registration Act, 1925, s. 19 (2): defined *ibid.* s. 3 (xxi).
[9] Land Registration Rules, 1925, r. 77 (4).
[10] *Ibid.* r. 109.
[11] Finance Act, 1931, s. 28 (3).
[12] Land Registration Act, 1925, s. 113.
[13] Land Registration Rules, 1930, r. 1, as amended by the Land Registration Rules, 1936.

(4) An application in printed form 1F (or form 1H when the rentowner is a corporation) for first registration of the title to the rentcharge.[14]

(5) A fee under scale 1 on twenty times the annual amount of the rentcharge (maximum fee, £59).[15]

The grantor should place his land certificate on deposit at the Registry immediately after completion, using printed form A.15 for the purpose. The registration cannot be completed without production of the certificate.[16]

Documents to be Lodged on a Transfer

When a rentcharge is created as the consideration for a transfer of land, the following documents should be posted to the Registry by the transferee within fourteen working days of the date of the official certificate of the result of the search issued by the Registry to him:

(1) The original transfer, which will be filed.

(2) Two certified copies of it. These will be made into office copies and so will become fully admissible in evidence.[17] One will be bound up in the rentcharge certificate issued to the rentowner; the other, in the land certificate of the transferee.

(3) The official search certificate.[18]

(4) An application cover in printed form A.4 when the whole of the land in a title is transferred, or A.5 when part only is transferred.[19] It is absolutely essential that clear directions should be given for the return of the various documents. Thus, it must be stated to whom the new land certificate is to be issued, to whom the new rentcharge certificate, and to whom any other documents which will not be retained in the Registry.

(5) The following fees are payable; a fee under scale 4 on the money consideration (if any) expressed in the transfer, plus a fee under scale 2 on the amount of the rentcharge for registration of the transfer of the land[20]; also a fee under scale 1 on twenty times the annual amount of the rentcharge, for registration of it.[21]

The transferor's land certificate must be produced to the Registry.[22] If the whole of the land is being transferred it will be handed over by the transferor at completion and must be lodged with the documents. If part only is transferred the certificate

[14] Obtainable from H.M. Stationery Office.
[15] Land Registration Fee Order, 1930, para. I; Fee Order Rule 11 (*a*).
[16] Land Registration Act, 1925, s. 64 (1) (*a*).
[17] *Ibid.* s. 113.
[18] Land Registration Rules, 1930, r. 1, as amended by the Land Registration Rules, 1936.
[19] Obtainable from H.M. Stationery Office.
[20] Land Registration Fee Order, 1930, para. II (2).
[21] *Ibid.* Fee Order Rule 11.
[22] Land Registration Act, 1925, s. 64 (1) (*a*).

should be placed on deposit in the Registry by the transferor as previously mentioned.[23]

Class of Title for Rentowner

In the cases which have been considered, if the transferor's or grantor's title to the land out of which a rentcharge issues is registered as absolute and the rentcharge is created in a legally effectual manner, the title of the rentowner will be registered as absolute. If, however, the title of the transferor or grantor is registered as possessory, it must first be converted to an absolute title (or, in the case of a transfer of part, the title to that part must be converted to absolute) if the rentcharge itself is to be registered with an absolute title.[24] Failing that, the rentowner will be registered with a title less than absolute; that is, probably, with a qualified title.[25]

Improvement of Land Act Rentcharges

When a landowner obtains a charge through the medium of the Minister of Agriculture, Fisheries and Food under the provisions of the Improvement of Land Act, 1864, the absolute order [26] creates in favour of the landowner a terminable yearly rentcharge which is enforceable by distress, entry for perception, and demise to a trustee.[27] Such a rentcharge may be the subject of substantive registration,[28] or may merely be noted as an incumbrance against the title of the registered land subject thereto.[29] An application to note a provisional order [30] or an absolute order should be accompanied by the order, a certified copy of it, the land certificate [31] and a fee of 10s.[32] If the applicant claims priority for the charge over other registered and noted incumbrances [33] a note of that claim will be made on the register.[34]

Charges arising under a number of other Acts may be treated similarly although not all of them are given statutory priority. Examples are, the General Land Drainage and Improvement Company's Act, 1849,[35] the Land Loan and Enfranchisement Company's Act, 1860,[36] the Limited Owners Reservoirs and Water

23 See p. 228, *ante*.
24 As to conversion generally, see the Land Registration Act, 1925, s. 77; the Land Registration Rules, 1925, rr. 48, 49; Sched. forms 6 and 8.
25 As to which, see the Land Registration Act, 1925, s. 7.
26 Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), ss. 51, 52 and Sched. B.
27 Improvement of Land Act, 1899, s. 3, which refers to the Conveyancing Act, 1881, s. 44. See now the Law of Property Act, 1925, s. 121.
28 As to which, see p. 226 *et seq.*, *ante*.
29 Under the Land Registration Act, 1925, s. 49 (1) (*a*).
30 Improvement of Land Act, 1864, ss. 25 to 27.
31 Land Registration Act, 1925, s. 64 (1) (*c*).
32 Land Registration Fee Order, 1930, para. VIII.
33 Improvement of Land Act, 1864, s. 59.
34 Land Registration Rules, 1925, r. 157.
35 12 & 13 Vict. c. xci.
36 23 & 24 Vict. c. clxix

Supply Further Facilities Act, 1877,[37] the District Councils (Water Supply Facilities) Act, 1897,[38] and the Lands Improvement Company's Acts, 1853 to 1920.[39]

Land Improvement: Settled Land

Improvements for the benefit of settled land which, not being expressly authorised by the terms of the Settled Land Act,[40] may nevertheless be authorised by the court,[41] are secured by a yearly rentcharge[42] which takes effect as if limited by the settlement prior to the estate of the tenant for life.[43] As this rentcharge may be overreached as if it were limited by the settlement[44] it seems, if the settled land is registered land, that the rentcharge is a minor interest,[45] so as to render it incapable of being noted on the register of the title to the land or of being the subject of substantive registration.[46]

Typical Entries on the Register

It is essential that the registered proprietor of the land, the rentowner, and the Registry should all possess full particulars of the rentcharges affecting the land, of all powers, provisions and remedies attaching thereto, and of any apportionments or exonerations that have been made. On the completion of transactions by registration the entries that are made on the register are designed to give this information in the clearest and most succinct manner possible, so that the whole position is revealed at a glance, whilst at the same time the source from which details can be obtained is immediately apparent and readily accessible. There can be no doubt that the picture presented by the register is far more easily comprehensible than any which can be obtained from the perusal of an abstract of title or from any one or more title deeds in unregistered conveyancing. The method of presentation which is almost invariably used is that of summarising each succeeding situation briefly in an entry on the register and of referring on the register to the document creating that situation. As regards transactions taking place after the date of first registration, an office copy of this document will almost invariably be bound up in the land or charge certificate and in the rentcharge certificate so that it is always readily available for perusal. This is not always possible in the case of lengthy pre-registration deeds which (or an abstract

[37] 40 & 41 Vict. c. 31.
[38] 60 & 61 Vict. c. 44.
[39] 16 & 17 Vict. c. cliv; 18 & 19 Vict. c. lxxxiv; 22 & 23 Vict. c. lxxxii; 26 & 27 Vict. c. cxl; and 10 & 11 Geo. 5. c. xi.
[40] Settled Land Act, 1925, s. 83; Sched. III, Pt. I.
[41] *Ibid.* s. 84 (4).
[42] *Ibid.* s. 85 (1).
[43] *Ibid.* s. 85 (2).
[44] *Ibid.* s. 85 (3).
[45] Defined, Land Registration Act, 1925, s. 3 (xv).
[46] *Ibid.* s. 86 (2).

of which), in consequence, are usually issued with the certificate, an abstract being filed in the Registry also.

The following are examples of the kind of entries that are made in the case of the transactions previously described.

(i) Transfer in Consideration of Rentcharge

When a building plot, being part of the land in a vendor's title, is transferred in consideration of a rentcharge,[47] the plot being previously unincumbered, the property register of the new title opened in the name of the rentowner [48] will take the following form in a simple case:

A. PROPERTY REGISTER — Title P. 00003

County or County Borough	Parish or Place
Blankshire	Blackport

A perpetual yearly rentcharge of £5 0s. 0d. (registered on 17 November, 1959) payable half-yearly on 25 March and 29 September created by a Transfer dated 14 November, 1959 by Alfred Alefounder to Wendy White.

The registered rentcharge is charged upon and issues out of the freehold land shown and edged with red on the plan of the above title filed at the Registry being land on the east side of Birkenpool Road.

Note 1: Original transfer filed under P. 00002: copy in certificate.

Note 2: The land charged is registered under title P. 00002.

The mention of the transfer being filed in the first Note on the register ensures that all the covenants and powers for the benefit of the security including, if it is used, an absolute power of re-entry, are brought, by reference, on to the register and their terms made easily accessible.

The vendor's title to his remaining land will record the transfer but in other respects will contain no significant entry in relation to the rentcharge. It does not therefore need exemplification. The charges register of the purchaser's title in the case referred to [49] will contain entries as follows [50]:

	C. CHARGES REGISTER — Title P. 00002	Application No. and remarks
1.	The land is subject to a perpetual yearly rentcharge of £5 0s. 0d. created by a Transfer dated 14 November, 1959 by Alfred Alefounder to Wendy White.	Rentcharge registered under P. 00003.
2.	The transfer dated 14 November, 1959 (referred to in entry No. 1 above), contains restrictive covenants.	Transfer filed: copy in certificate.

[47] See form 12, p. 699, *post*.
[48] Land Registration Rules, 1925, r. 108.
[49] See form 12, p. 699, *post*.
[50] Land Registration Rules, 1925, r. 107 (2).

The first of these simple entries, referring, as it does, to the filed transfer and to the fact of a copy of it being bound up in the land certificate, ensures that all the covenants, powers and provisions relating to the rentcharge are brought on to the register and that details of them are made readily available.

Assuming that the vendor is going to sell every plot on his estate in consideration of a rentcharge it may be convenient for him to have all the rentcharges registered under a single title. In such a case, therefore, he should advise the Registry of his intentions at the time when the first transfer is lodged for registration. The Registry will then, on request, open a rentcharge title and make the necessary additions to it each time a transfer is lodged for registration. Its property register will build up in the following manner:

A. PROPERTY REGISTER Title P. 00003

COUNTY OR COUNTY BOROUGH	PARISH OR PLACE
Blankshire	Blackport

THE PERPETUAL YEARLY RENTCHARGES created by the Transfers described below and charged upon and issuing out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry of which the following are short particulars:

Rentcharge	*Land out of which rentcharge issues (reference on filed plan)*	*Date and parties of transfer creating rentcharge*	*Transfer filed under*
£5 0s. 0d. payable half-yearly on 25 March and 29 September (registered on 17 November, 1959).	Nod. 1 in yellow on the filed plan.	14 November, 1959: (1) Alfred Alefounder. (2) Wendy White.	P. 00002.
£5 0s. 0d. payable half-yearly on 25 March and 29 September (registered on 21 November, 1959).	Nod. 2 in yellow on the filed plan.	20 November, 1959: (1) Alfred Alefounder. (2) Charles Cator and Cecilia Cator.	P. 00004.
£6 0s. 0d. payable half-yearly on 25 March and 29 September (registered on 4 December, 1959).	Nod. 3 in yellow on the filed plan.	1 December, 1959: (1) Alfred Alefounder. (2) Felix Formby.	P. 00005.

(ii) Transfer Informally Apportioning Rentcharge

When parts of the land in a title which is subject to a rentcharge are sold for a cash consideration and the rentcharge is apportioned on each sale,[51] the entries on the charges register of the vendor's title will take the form of those set out below. The first entry shown will, of course, have been in existence before the date of the transfer.

Title P. 00006

C. CHARGES REGISTER

		Application No. and remarks
1.	Nos. 11 to 39 (odd numbers) Middlecliffe Street are subject to a perpetual yearly rentcharge of £40 17s. 3½d. created by a Conveyance dated 17 November, 1888 and made between (1) Bertram Ballard (2) Rupert Reckitt and Percy Pickersgill (3) Henry Harland.	Abstract issued with certificate: abstract filed.
2.	By the undermentioned transfers the rentcharge of £40 17s. 3½d. (referred to in entry No. 1 above) was expressed to be informally apportioned between the parties as follows:—	

Date and parties	*Land transferred and sum apportioned to it*	*Title No. of land transferred*	*Covenants and remedies*	
3 December, 1959: (1) Phillip Patman. (2) Daniel Derry.	27 Middlecliffe St. £2 18s. 6d.	P. 00007	The cross covenants and powers referred to in the Law of Property Act, 1925, ss. 77 and 190.	Registered on 5 Dec. 1959.
14 December, 1959: (1) Phillip Patman. (2) Robert Reacher and Reuben Reacher.	17 Middlecliffe St. £3 2s. 6d.	P. 00008	Mutual covenants for payment.	Registered on 17 Dec. 1959.
19 December, 1959: (1) Phillip Patman. (2) Blanche Bickerstaff.	31 Middlecliffe St. £3 0s. 3d.	P. 00009	Mutual covenants and cross powers of distress and entry for perception.	Registered on 20 Dec. 1959.

[51] See form 13, p. 703, *post*.

The entry on the charges register of the title of the first transferee will be framed as shown below. If the implied covenants on the part of the transferee have been modified or negatived, this fact will usually appear in a note in the proprietorship register.

	Title P. 00007 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 11 to 39 (odd numbers) Middlecliffe Street are subject to a perpetual yearly rentcharge of £40 17s. 3½d. created by a Conveyance dated 17 November, 1888 and made between (1) Bertram Ballard (2) Rupert Reckitt and Percy Pickersgill (3) Henry Harland.	Abstract filed under P. 00006.
	Note: By a Transfer dated 3 December, 1959, by Phillip Patman to Daniel Derry the said rentcharge was informally apportioned as to £2 18s. 6d. to the land in this title and as to £37 18s. 9½d. to the remainder of the land subject thereto.	Filed: copy in certificate.

(iii) Formal Apportionment

Where, in a similar transaction to that last described, the rentcharge is, with the consent of the rentowner, formally apportioned,[52] the same kind of entries will be made on the register except that there will be an unequivocal statement that the apportionment was formally made. If the title to the rentcharge is registered, the rentcharge certificate must be lodged. A note of the formal apportionment will then be added to the property register of the rentcharge title.

(iv) Transfer in Consideration of Rentcharge Free from Overriding Rentcharge

The next situation occurs where a vendor who holds a row of houses subject to a rentcharge decides to sell them in consideration of an improved rentcharge and agrees that his retained land shall remain responsible for the overriding rentcharge.[53] After registration of the transfer, the charges register of the vendor's title will contain entries such as those set out below. It has been assumed that the Registry has been told of the intention to sell all the houses, so that the second entry will remain open but will be gradually completed as succeeding transfers are registered. The power of collection previously referred to[54] will not, of course, be conferred on a first transferee.

[52] See form 14, p. 705, *post*.
[53] See form 15, p. 707, *post*.
[54] See p. 224, *ante*.

	Title P. 00011 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 20 to 30 (inclusive) Liverhead Street are subject to a perpetual yearly rentcharge of £45 0s. 0d. created by a Conveyance dated 18 April, 1956 and made between (1) Thomas Thellusson (2) Nathaniel le Neve.	Conveyance issued with certificate: abstract filed.
2.	By the Transfers, of which short particulars are given below, the rentcharge of £45 0s. 0d. (referred to in entry No. 1 above) was charged exclusively upon the land remaining in this title and subject thereto in informal exoneration of the land transferred and the transferees were given the remedies mentioned below in case of default by the transferor:	
	Date and parties / *Land transferred* / *Transferee's remedies* 19 November, 1959: (1) Nathaniel le Neve. (2) Bertie Baxendale. / 27 Liverhead Street. / Powers of retainer and distress.	Filed under P. 00012. Registered on 23 Nov. 1959.
	[*Other similar entries will follow.*]	

In the like case the charges register of the first purchaser's title will contain entries such as these:

	Title P. 00012 C. CHARGES REGISTER	Application No. and remarks
1.	Nos. 20 to 30 (inclusive) Liverhead Street are subject to a perpetual yearly rentcharge of £45 0s. 0d. created by a Conveyance dated 18 April, 1956 and made between (1) Thomas Thellusson (2) Nathaniel le Neve. *Note*: By the Transfer dated 19 November, 1959 (referred to in entry No. 2 below) the said rentcharge was charged exclusively upon the land remaining in title P. 00011 and subject thereto in informal exoneration of the land in this title and the transferee was given powers of retainer and distress in case of default by the transferor.	Abstract filed under P. 00011.
2.	The land is subject to a perpetual yearly rentcharge of £7 10s. 0d. created by a Transfer dated 19 November, 1959, by Nathaniel le Neve to Bertie Baxendale.	Filed: copy in certificate.

The vendor, as the owner of the newly created rentcharge, must, for his own protection, complete the dispositionary rentcharge by

registration [55] and the property register of his rentcharge title will take the form indicated below. It is open to him to apply, if he wishes, for all the improved rentcharges to be registered under a single title.[56]

A. PROPERTY REGISTER Title P. 00013

County or County Borough	Parish or Place
Blankshire	Manford

A PERPETUAL YEARLY RENTCHARGE of £7 10s. 0d. (registered on 23 November, 1959) payable half-yearly on 25 March and 29 September created by a Transfer dated 19 November, 1959 by Nathaniel le Neve to Bertie Baxendale.

The registered rentcharge is charged upon and issues out of the FREEHOLD LAND shown and edged with red on the plan of the above title filed at the Registry known as 27 Liverhead Street.

Note 1: Original transfer filed under P. 00012: copy in certificate.

Note 2: The land charged is registered under title P. 00012.

Note 3: The land out of which the registered rentcharge issues is, with other land, subject to a prior yearly rentcharge of £45 0s. 0d. created by a Conveyance dated 18 April, 1956 and made between (1) Thomas Thellusson (2) Nathaniel le Neve. By the Transfer dated 19 November, 1959 (referred to above), the said rentcharge of £45 0s. 0d. was charged exclusively upon the land remaining in title P. 00011 in informal exoneration of the land transferred and the said Transfer conferred upon the transferee powers of retainer and distress in case of default by the transferor.

[55] Land Registration Act, 1925, s. 19 (2).
[56] See p. 282, *ante*.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Taylor v. *Ellis* [1960] 2 W.L.R. 509; [1960] 1 All E.R. 549 (Ch.D.);
Stroud Building Society v. *Delamont* [1960] 1 W.L.R. 431;
[1960] 1 All E.R. 749 (Ch.D.)

Mortgage—lease by mortgagor without consent of mortgagee—adoption of tenancy—Law of Property Act, 1925, *ss.* 99, 109; *Conveyancing Act*, 1881, *s.* 18.—If and so far as a contrary intention is not expressed in writing, a mortgagor in possession can grant certain leases binding on the mortgagee (Law of Property Act, 1925, s. 99, replacing Conveyancing Act, 1881, s. 18). Frequently it is provided that this power is only to be exercised with the consent in writing of the mortgagee. Then a lease made by a mortgagor in possession without such consent is effective to bind him (*Iron Trades Employers Insurance Association* v. *Union Land and House Investors* [1937] Ch. 313) but does not bind the mortgagee, who can therefore recover possession against both mortgagor and tenant (*Dudley and District Benefit Building Society* v. *Emerson* [1949] Ch. 707).

The two instant cases, both decided by Cross J., are noted together because they are both concerned with the circumstances in which a mortgagee may be held to have adopted such a tenancy granted without his consent.

In *Taylor* v. *Ellis* the mortgagor of a mortgage made in 1924 granted a monthly tenancy in 1940 and died in 1943. Interest under the mortgage ceased to be paid in 1950 and in 1957 the mortgagee died. It was accepted that the mortgagee knew of the tenancy. Cross J. held (i) in the absence of any evidence whether consent had or had not been given, the onus of proof was on the tenant. The learned judge pointed out that in an action of ejectment it would have been sufficient for the mortgagee to plead his title, and held that the tenant could not by asserting a tenancy throw the burden of proof back again. (ii) Mere inaction by a mortgagee, even with knowledge, could not make the tenancy binding on him, following *Re O'Rourke's Estate* (1889) 23 L.R.Ir. 497 and *Parker* v. *Braithwaite* [1952] 2 All E.R. 837. Until he wanted to enforce his security a mortgagee could let the mortgagor manage the property how he liked. Nor did the failure to demand interest for nine years alter the position. Consequently the mortgagee in *Taylor* v. *Ellis* obtained possession.

In *Stroud Building Society* v. *Delamont* the mortgage was created in 1947, and the tenancy, a weekly one, in 1948. The mortgagor was adjudicated bankrupt in 1956 and shortly thereafter the society demanded possession but did not enforce this demand. The tenant paid rent to the trustee in bankruptcy until in January 1958 the society appointed their secretary as receiver under the Law of

Property Act, 1925, s. 109, and he instructed the tenant to pay to him. Apparently this was not done, for in March 1958, the tenant's solicitors asked the society's solicitors for the "terms and conditions" of the tenancy. The society's solicitors replied that the terms were the same as those between tenant and mortgagor, and threatened to take proceedings for recovery of rent and for possession. The tenant thereupon paid arrears of rent and subsequent rent by cheques drawn in favour of the society. In July 1958 the society's solicitors sent a notice to quit signed by their secretary acting as such (and not as receiver, as was conceded) and referring to premises "which you hold as tenant of the said Stroud Building Society." Rent was paid after this notice. Cross J. said that until the appointment of the receiver the society had not accepted the tenant and, further, that acceptance of rent by the receiver did not affect the position, since a receiver is agent of the mortgagor (Law of Property Act, 1925, s. 109 (2); *Lever Finance, Ltd.* v. *Needleman's Trustee* [1956] Ch. 375). But he held that the subsequent dealings set out above, though perhaps each was explainable taken alone, in their cumulative effect forced the inference that the society had accepted the tenant as its tenant, and consequently was not entitled to possession.

The learned judge suggested in the *Stroud* case that the society had probably overlooked the advantages which they could gain by dealing with the tenant through the receiver, technically the mortgagor's representative. However that may be, these two cases demonstrate both the strength of the mortgagee's position opposite a tenant with whom he has had no dealings, and how easily that position can be prejudiced. Mortgagees who are considerate to tenants (who are likely to be unaware of the flaw in their landlord's title) and refrain from an immediate claim to possession must act very carefully where any statutory protection of the tenant may operate.

Diamond v. *Campbell-Jones and Others* [1960] 2 W.L.R. 568; [1960] 1 All E.R. 583 (Ch.D.)

Sale of land—breach of contract—knowledge to be imputed to vendor.—Where a vendor is in breach of a contract to sell land because he is unable to deduce a good title, the rule in *Bain* v. *Fothergill* (1874) L.R. 7 H.L.C. 158 limits the purchaser's claim to return of his deposit, interest and expenses. If, however, the breach occurs for other reasons the purchaser can claim general damages for the loss of his bargain, on the principles laid down in such leading cases as *Hadley* v. *Baxendale* (1854) 9 Exch. 341 and *Victoria Laundry (Windsor), Ltd.* v. *Newman Industries, Ltd.* [1949] 2 K.B. 528. The question in the instant case was whether these latter principles entitled a purchaser to claim for the loss of prospective profits which would have accrued from rebuilding on the property contracted to be sold. Buckley J., after referring to the above authorities and remarking that neither the pleadings nor evidence showed that the defendant vendors knew that the plaintiff purchaser was a dealer in property proposing to convert, said "Special circumstances are necessary to justify imputing to a vendor of land a knowledge that the purchaser intends

to use it in any particular manner. In my judgment neither the fact that No. 44 Green Street was ripe for conversion nor indeed the fact that everybody recognised this, was sufficient for imputing to the vendors knowledge that the purchaser was a person whose business it was to carry out such conversions, or that he intended, or was ever likely, to convert the house himself for profit" ([1960] 2 W.L.R. at pp. 578–579; [1960] 1 All E.R. at p. 591). Consequently damages were limited to the difference between the sale price and the market price, which amounted, however, to some £8,000. The learned judge held further that tax should not be deducted because the moneys would be taxable in the hands of the plaintiff having regard to his business being that of a property dealer (distinguishing *British Transport Commission* v. *Gourley* [1956] A.C. 185).

Samson v. *Samson* [1960] 1 W.L.R. 190; [1960] 1 All E.R. 653 (C.A.)

Husband and wife—wedding presents—whether any presumption as to ownership—Married Women's Property Act, 1882, *s.* 17; *Matrimonial Causes* (*Property and Maintenance*) *Act*, 1958, *s.* 7.—A husband and wife made cross-applications, under the Married Women's Property Act, 1882, s. 17, for the delivery of chattels, and under the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7, for the payment of money. The Court of Appeal (Hodson, Willmer and Devlin L.JJ.) in affirming the order of the registrar, discussed the principles to be applied to disputes about wedding presents. These seem to be:

(i) There is no rule or even presumption that wedding presents are given to the spouses jointly. Consequently Hodson L.J., who gave the only judgment, the other Lords Justices merely concurring, rejected the submission that this was a case for a "fair and equitable" division on the basis of *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 and *Re A Debtor* (No. 80 of 1957) [1958] Ch. 81 (*per* the dissenting judgment there of Jenkins L.J.).

(ii) The intention of the donor is relevant as evidence.

(iii) In the absence of evidence the court is fully entitled to draw the inference that presents from the husband's friends and relatives were given to him, and those from the wife's friends and relatives to her. In the present case there were no gifts from friends of both spouses, but presumably there the inference would be of a joint gift.

(iv) Gifts originally given to one spouse may become joint by inference from subsequent use or conduct.

(v) If money has been given and expended on a matrimonial purpose, it does not follow that the court would order repayment.

This case illustrates the problems that our law may produce by carrying to its furthest point the principle of individual property as opposed to allowing any form of matrimonial property. If the marriage breaks down, or on the death of one spouse (see "The Matrimonial Home; Proposals of the Royal Commission on Marriage and Divorce," by F. R. Crane, Vol. 21 at p. 139) title to household goods and chattels may have to be investigated for the first time;

as regards wedding presents, this title is based primarily on the unexpressed and, it is submitted, very often non-existent intention of a donor at the time of the marriage. Of course some gifts, such as that of family jewellery to a daughter on her marriage, are intended for one spouse only. But what answer would most wedding guests give to the officious bystander (straying from the law of contract) who asked what should happen to their presents if the bride and bridegroom should get divorced in ten years' time? Would they have any views? Would not a presumption of joint ownership, at any rate as regards the contents of the matrimonial home or money spent on them, be much simpler and more satisfactory both on the breakdown of marriage and on death? In the former event the inquiry as to title would be replaced by exercise of the court's discretion on the *Rimmer* v. *Rimmer* principle.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Inland Revenue Commissioners v. *Bernstein* [1960] 2 W.L.R. 554; [1960] 1 All E.R. 697 (Ch.D.)

Trust—power of advancement—contrary intention—accumulation —presumption concerning childbearing—Trustee Act, 1925, *ss.* 32, 69.—This case arose out of a claim for tax under the Income Tax Act, 1952, s. 405, but should, it is thought, be mentioned here because Danckwerts J. decided two points of general interest in the law of trusts. These were:

(i) A trust to accumulate income operates as a "contrary intention" under the Trustee Act, 1925, s. 69 (2), so as to exclude the exercise of the statutory power of advancement given by section 32 of that Act, following *Re Turner's Will Trusts* [1937] Ch. 15, a similar decision on the statutory power of maintenance under section 31 of the Act. It may be added that it was further held in *Re Ransome* [1937] Ch. 348 that a trust to accumulate excluded the latter power even during a period of invalidity under the Law of Property Act, 1925, s. 164.

(ii) As in the case of perpetuity, a woman is not in cases concerning accumulation to be treated as past childbearing, whatever her age, following *Re Deloitte* [1926] Ch. 56 and *Re Blake* [1938] A.C. 575.

Jones v. *Challenger* [1960] 2 W.L.R. 695; [1960] 1 All E.R. 785 (C.A.)

Trust for sale—discretion of court to order sale—former matrimonial home—Law of Property Act, 1925, *s.* 30.—The Court of Appeal (Ormerod and Devlin L.JJ., Donovan J.) here re-examined

the principles to be applied when the court is asked to order, under the Law of Property Act, 1925, s. 30, a sale of land held on trust for sale.

A husband and wife, since divorced (but referred to in the judgments and here as "husband" and "wife") had purchased a house as a matrimonial home. The husband was still living there and the wife now sought an order for sale. Devlin L.J., stating the facts in a considered judgment with which Ormerod L.J. concurred, said "The assignment of the lease was granted to the purchasers as trustees to sell the same with power to postpone the sale thereof on trust for themselves as joint tenants," adding that the purchase-money was provided equally and "they are thus beneficiaries in equal shares" ([1960] 2 W.L.R. 696; [1960] 1 All E.R. 786). Indeed the whole case proceeds on the basis that a sale would result in payment of her share to the wife. Yet the conveyance apparently made the parties joint tenants at law and in equity, and it is only where purchase-money is provided in *unequal* shares that equity presumes a tenancy in common (*Lake* v. *Craddock* (1732) 3 P.W. 158). It would seem that the wife's application must have asked for division of the proceeds of sale (as stated in the headnote to the All England report but not elsewhere) and thereby operated as a notice severing the joint tenancy under section 36 (2) of the Law of Property Act, 1925. The question of whether or not a *jus accrescendi* exists could, of course, be relevant to the exercise of the court's discretion to order a sale.

The majority of the Court of Appeal (Devlin and Ormerod L.JJ.) considered that the county court judge in refusing to order a sale had wrongly applied the test of whether to do so would be reasonable or unreasonable. Devlin L.J. considering *Re Mayo* [1943] Ch. 302 and *Re Buchanan-Wollaston's Conveyance* [1939] Ch. 738 said "Simonds J. [in *Re Mayo*] was applying the simple and fundamental principle that in a trust for sale there is a duty to sell, and a power to postpone; and that accordingly one trustee may call on the others to perform the duty, but all must be agreed if they are to exercise the power. This simple principle cannot prevail where the trust itself, or the circumstances in which it was made, show that there was a secondary or collateral object besides that of sale" ([1960] 2 W.L.R. at p. 698; [1960] 1 All E.R. at p. 787). After referring to *Re Buchanan-Wollaston, supra, Re Hyde's Conveyance* (1952) 102 L.J. 58, *Re No. 39 Carr Lane, Acomb, Stevens* v. *Hutchinson* [1953] Ch. 299 and *Bull* v. *Bull* [1955] 1 Q.B. 234 as cases exemplifying the principle, the learned Lord Justice said "There is, as I have said, something akin to *mala fides* if one trustee tries to defeat a collateral object in the trust by arbitrarily insisting on the duty of sale. He should have good grounds for doing so and, therefore, the court will inquire whether, in all the circumstances, it is right and proper to order the sale . . . the true question is whether it is inequitable for the wife, once the matrimonial home has gone, to want to realise her investment" ([1960] 2 W.L.R. 700; [1960] 1 All E.R. at pp. 788, 789). On the facts Devlin L.J. said an order for sale must be made.

Donovan J. dissented because he thought the county court judge had used the word "reasonable" as equivalent to "right and proper"

and so applied the right test. The learned judge founded his judgment on a passage from *Re Buchanan-Wollaston's Conveyance* where Greene M.R. said ([1939] Ch. at p. 747) that however a trust for sale arose a court of equity "must look into all the circumstances of the case and consider whether or not, at the particular moment and in the particular circumstances when the application is made to it, it is right and proper that such an order shall be made." Donovan J. would therefore have made an order for sale only if the husband failed to buy the wife out.

This decision is to be warmly welcomed if it demotes *Re Mayo* from the dominant position it has usually hitherto held in the books. (But see *Re Steed's Trusts*, noted *infra*.) In the writer's respectful submission, however, it does not go far enough, and the dissenting judgment of Donovan J. is, ideally, preferable. It must be conceded first (perhaps reluctantly) that a settlor or testator can decide whether the fruits of his bounty shall be enjoyed in the form of land or of money, for a contrary intention destroys the power to postpone sale (*Re Rooke* [1953] Ch. 716), and second, that prior to 1926 the choice of the trust for sale as a method of settlement did imply an intention that a sale should take place sooner rather than later. But this second premise has surely been destroyed by the 1925 legislation. Identical beneficial interests can be treated under the Settled Land Act or by way of trust for sale (see L. P. A., 1925, s. 130); *Re Meux, deceased* [1958] Ch. 154). The trust for sale is the technical device used to overcome the conveyancing problems of concurrent ownership (L. P. A., ss. 34–36) and can be and is artificially prolonged for that purpose and to keep equities off the title (L. P. A., s. 23). It is frequently regarded as an alternative method of settling land. Therefore it is submitted with respect that the existence of a "fundamental principle" raising a presumption in favour of sale no longer meets the realities of the case. Moreover, the canons of statutory construction now appear to support this contention. The Law of Property Act, 1925, has recently been declared by the House of Lords in *Grey* v. *Inland Revenue Commissioners* [1960] A.C. 1 (noted *ante*, p. 69) to be an amending as well as a consolidating statute, at least in so far as it replaces the Law of Property Act, 1922, or the Law of Property Act, 1924. Section 30 of the Law of Property Act, 1925, replaces paragraph 4 (5) of the Fourth Schedule to the Law of Property Act, 1922, and, moreover, in giving the court discretion to make "such order as it thinks fit" is drafted much more widely than was the Settled Land Act, 1884, s. 7. It is therefore submitted that the court should simply look at the circumstances of each case without any predilection for sale; for this purpose the trust for sale should be regarded primarily as a conveyancing device.

Re Steed's Will Trusts [1960] 2 W.L.R. 474; [1960] 1 All E.R. 487 (C.A.)

Variation of trusts—protective trusts—jurisdiction of court and exercise of discretion—Variation of Trusts Act, 1958—The Court of Appeal (Lord Evershed M.R., Willmer and Upjohn L.JJ.) has

affirmed the decision of Harman J. (noted *ante*, Vol. 23 at p. 221) and in so doing has removed the principal misgivings to which that decision gave rise. It will be remembered that the plaintiff, entitled for life on protective trusts and in remainder by her exercise of a general power of appointment, sought to make the trust property her own by, in effect, striking out the possible discretionary trust.

Lord Evershed M.R., giving the principal judgment with which the other members of the court agreed, said, first, that he did not think the "arrangement" which the Variation of Trusts Act, 1958, gives jurisdiction to approve was limited to any scheme *inter partes*, but was "deliberately used in the widest possible sense so as to cover any proposal which any person may put forward for varying or revoking the trusts" ([1960] 2 W.L.R. at p. 481; [1960] 1 All E.R. at p. 492). This removes the fear (see Vol. 23 at p. 223) that the court might restrictively interpret this new jurisdiction.

Secondly, Lord Evershed said the courts were not concerned to approve on behalf of the trustees or of the plaintiff, but simply on behalf of the possible beneficiaries under the possible protective trust. As the plaintiff was fifty-three and unmarried, he reduced these to the "spectral spouse." (But one must note that the plaintiff as principal beneficiary would also be an object of the discretion and so within the defined category.) The Master of the Rolls went on to say that the court must consider not merely the material benefit or limited interest of this spectral spouse, but the arrangement as a whole on behalf of such person, and that this involved the intention of the testator; "the court must, albeit that it is performing its duty on behalf of some person who cannot consent on his or her own part, regard the proposal in the light of the purpose of the trust as shown by the evidence of the will or settlement itself, and of any other evidence available" ([1960] 2 W.L.R. at p. 483; [1960] 1 All E.R. at p. 493). He thought it was clear that the testator intended to ensure provisions for the plaintiff during her life (having not shared her views on the merits of a relative) and that this purpose should not be overridden. Upjohn L.J., in agreeing, added "I agree that this court is not confined to the narrow duty of inquiring into the effect of a proposed scheme on those on whose behalf approval by the court is sought. The court must be satisfied that the scheme, looked at as a whole, is proper to be sanctioned by the court. On that matter, the views of the trustees are entitled to respect, but are not conclusive" ([1960] 2 W.L.R. at p. 484; [1960] 1 All E.R. at p. 494).

The construction here placed on the Act may perhaps be described as gratifyingly robust. Except where possible beneficiaries under a future discretionary trust are concerned (s. 1 (1) (*d*)) the Act requires the arrangement to be for the benefit of the persons on whose behalf approval is given, and it might be argued that Parliament intended adults of full capacity to be the arbiters of their own benefit. Yet in the present case that would have reduced the court to rubber-stamping. The decision further underlines the potency of the discretionary trust (see Vol. 23 at p. 223) and reiterates the ability of settlors to protect beneficiaries against themselves.

Lord Evershed M.R. also considered whether the trustees should be restrained from selling a farm which was part of the trust

property—a point which was not dealt with in the reports of the case at first instance. He accepted counsel's proposition that "in the absence of *mala fides* or some other special circumstances which would show at least grave misdirection of themselves by the trustees, the court will not interfere, particularly in a case where there is an express trust for sale and where the trusts as declared clearly impose, and are intended to impose, a duty in the discharge of which the trustees have reached their conclusion," referred to *Re Mayo* [1943] Ch. 302, and added that the court should not overrule the trustees out of sympathy for the plaintiff ([1960] 2 W.L.R. at p. 480; [1960] 1 All E.R. at p. 492). It is hoped, for the reasons given in the note to *Jones* v. *Challenger, supra,* that this passage may be regarded as approval of the trustees' action and exercise of their discretion rather than as declining jurisdiction where one or more trustees desire to sell; it may be added that apparently the application here was not made under the Law of Property Act, 1925, s. 30.

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3. *CHARITIES*

By Gareth H. Jones, Barrister-at-Law

Re The Jewish Orphanage Endowments Trust. Sebag-Montefiore and Others v. *Rothschild Executor and Trustee Co. and Another* [1960] 1 W.L.R. 344; [1960] 1 All E.R. 764

Charity—scheme—construction of investment clause—whether investment clause could be altered by resolution to extend the range of investments.—Cross J. was required in this case to construe a clause of a scheme in relation to a charity laid down by the Charity Commissioners in July 1876. The particular clause of the scheme provided that if "any alteration or modification of this scheme" should be required for any purpose, then such alteration or modification should be made by resolution, provided that such alteration should not involve "a deviation from the main principles of this scheme." The petitioners sought to amend the investment clause of the scheme which allowed the trustees to invest the funds of the charity in a range of investments wider than that permitted by section 1 of the Trustee Act, 1925. The Attorney-General argued that the resolution which had been passed and had authorised an extension of the powers of investment of the trustees was invalid for two reasons. First he said that the resolution was invalid because the 1876 scheme on its true construction did not cover an alteration of the range of investments as originally framed. For this proposition he relied upon a dictum of Harman J. in *Re Tobacco Trade Benevolent Association* [1958] 1 W.L.R. 1113, 1116. Cross J. rejected this submission. He did not share Harman J.'s doubts and he could see no difference between a case where a settlor empowers his trustee to invest in forms of investments outside the Trustee Act and where the settlor confers

on some other person a power to enlarge the original investment clause as in the present case. Similarly the learned judge found that the Attorney-General's second submission, that an alteration in the investment clause of the trust would constitute a deviation from the main principles of the scheme, was also without merit. He could not see that a wide investment clause, which today is commonplace in most trust instruments, should even in 1876 have been regarded as a main principle of this charitable trust.

This case is yet another example of the willingness of the court to extend the range of trustee investments and a sad recognition of the decline in value of government securities. It is interesting to observe that the resolution in the present case authorised the trustees to invest two-thirds of the trust funds in "first class equities." In the Government White Paper concerning the Powers of Investments of Trustees ((1959) Cmnd. 915) it is proposed that trustees shall have power to invest only half the trust fund in equities of a limited class (see para. 5); so that even if the White Paper does become law it may not see the end of applications such as the present application in the *Jewish Orphanage* case.

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4. *WILLS*

By Gareth H. Jones, Barrister-at-Law

In the Estate of Cook (deceased). Murison v. *Cook and Another* [1960] 1 W.L.R. 353; [1960] 1 All E.R. 689

Will—execution—whether a signature within the meaning of the Wills Act, 1837, *s.* 9.—In this curious and interesting case the testatrix had drawn up a holograph will which was duly witnessed by two competent witnesses in accordance with the provisions of section 9 of the Wills Act. The will which was written on two sheets of paper began: "I, Emmie Cook declare this to be my last will" and it ended, "Please Leslie be kind to Dot. Your loving mother." Leslie referred to the first defendant and Dot referred to the plaintiff.

The question which Collingwood J. was called to decide was whether the expression "Your loving mother" constituted a signature within the meaning of the Wills Act. The learned judge had no difficulty in holding that it did. He quoted numerous authorities, including the judgment of Coleridge J. in *Baker* v. *Dening* (1838) 8 Ad. & El. 94 and the judgment of Lord Campbell L.C. in *Hindmarsh* v. *Charlton* (1861) 8 H.L.Cas. 160. Lord Campbell in that latter case said, "I will lay down this as my notion of the law: that to make a valid subscription of a witness, there must either be the name or some mark which is intended to represent the name." On the facts of the present case his lordship was "quite satisfied" that the words "Your loving mother" were such a mark which were intended to represent the name of the testatrix.

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Green v. *Bowes-Lyon* [1960] 1 W.L.R. 176;
[1960] 1 All E.R. 301 (Q.B.D.)

Landlord and Tenant Act, 1954—reversionary tenancy or agreement for future tenancy—Act of 1954, ss. 28, 65 (3).—Section 28 of the Landlord and Tenant Act, 1954, provides that " where the landlord and tenant agree for the grant to the tenant of a future tenancy of the holding, or of the holding with other land, on terms and from a date specified in the agreement, the current tenancy shall continue until that date but no longer, and shall not be a tenancy to which [Part II] of the Act applies." Section 65 (3) provides that " where by virtue of any provision of this Act a tenancy . . . is continued beyond the beginning of a reversionary tenancy which was granted . . . so as to begin on or after the date on which apart from this Act the continuing tenancy would have come to an end, the reversionary tenancy shall have effect as if it had been granted subject to the continuing tenancy." The distinction between a " reversionary tenancy " and an " agreement for a future tenancy " in the view of Pearson J. lies in the fact that a " reversionary tenancy " creates an estate, whereas an " agreement for a future tenancy " creates merely a set of contractual rights and obligations.

In March 1959 the premises in this case were held on a long lease by a Mr. Rye. A Mrs. Wells held a sub-lease of the whole premises expiring on April 4, 1959. The plaintiff held a sub-lease of the ground floor and basement from Mrs. Wells expiring on April 1, 1959. The defendant held a sub-lease of the ground floor from the plaintiff expiring on March 31, 1959. And the defendant also held a lease (described as a " reversionary lease ") of the ground floor from Mr. Rye for seven years from April 5, 1959, the day after the sub-lease of Mrs. Wells was due to expire. The sub-tenancy of the plaintiff and the sub-tenancy which the defendant held of the plaintiff were both " business tenancies " within the meaning of the Landlord and Tenant Act, 1954; and they were both continued by section 24 (1) of that Act beyond the date upon which they would have expired at common law. Upon these facts the defendant was clearly the sub-tenant of someone in June 1959. But the question was " whose sub-tenant was she? " Pearson J., applying the explanation of the nature of a reversionary lease in *Woodfall on Landlord and Tenant*, 25th ed., at p. 286, held that the lease of the ground floor granted by Mr. Rye to the defendant was indeed a " reversionary lease," which took effect subject to the continuing tenancy of the ground floor held by the defendant of the plaintiff. The plaintiff's claim for rent due from the defendant on June 29, 1959, was, therefore, successful.

Isaac v. *Hotel de Paris, Ltd.* [1960] 1 W.L.R. 239;
[1960] 1 All E.R. 348 (P.C.)

Lease or licence—hotel premises—exclusive occupation—monthly payments—whether tenancy created—notice to remove stock and

other materials—acceptance of monthly payments after notice—whether right to immediate possession waived.—The distinction between a lease of land and a licence to occupy land depends upon the intention of the parties in each case. Exclusive possession coupled with the payment and acceptance of rent, though strong evidence of a tenancy, is not conclusive evidence in cases where the Rent Restrictions Acts apply (see, for example, *Marcroft Wagons, Ltd.* v. *Smith* [1951] 2 K.B. 496); and the Judicial Committee of the Privy Council held in this case that even where the Rent Acts do not apply, a monthly tenancy is not necessarily to be inferred from exclusive possession and the payment of a monthly rent. The circumstances in which exclusive possession has been given and the character in which money paid as rent has been received must also be considered.

Upon the facts of the present case it was held that the appellant was only intended to have a personal privilege of running a night bar on hotel premises owned by the respondent company and that despite the payment and acceptance of a number of monthly sums described as " rent " he had not been granted any interest in the land. It was also held that this personal privilege had been validly terminated by a notice served in May 1956 to remove his stock and other materials from the premises within seven days. But the appellant did not comply with this notice: and he remained in possession of the premises, making monthly payments of the same amounts which were still described as " rent," even after the writ in the action had been issued in October 1956. It was held, however, that from May 1956 onwards he was only " there at sufferance liable to be turned out whenever the plaintiff company thought fit to execute its right to do so ": and that in the circumstances the acceptance of the so-called " rent " by the company did not evince any intention to waive its right to immediate possession.

Legge and Others v. *Matthews and Another* [1960] 2 W.L.R. 620; [1960] 1 All E.R. 595 (C.A.)

Rent Acts—Act of 1957*—decontrol—statutory tenancy—decontrol of whole premises—part of premises lawfully sub-let—sub-let part not within decontrolling provision—whether sub-tenant protected against head landlord—Act of* 1920, *s.* 15 (3)*—Housing Repairs and Rents Act*, 1954, *s.* 41.—The question in this case was whether the sub-tenant of part of a house, whose premises have not been decontrolled by section 11 of the Rent Act, 1957, can claim the protection of the Rent Acts against the head landlord after the premises comprised in the head lease have been so decontrolled. The Act of 1957 is silent on the point: and it was conceded that any such protection must be derived from either section 15 (3) of the Act of 1920 or section 41 of the Housing Repairs and Rents Act, 1954, or from a combination of the two.

In 1953 the first defendant took a lease of a house which was at that time within the protection of the Rent Acts. Later in the same year she lawfully sub-let the ground floor of the house as a separate dwelling to the second defendant. In April 1957 the first defendant's

tenancy of the whole house became a statutory tenancy. On July 6, 1957, the house as a whole was decontrolled by the Rent Act, 1957: but the rateable value of the ground floor was only £16, so that the part sub-let did not fall within the scope of section 11 (1) of that Act. At the end of the transitional period of fifteen months prescribed by section 1 (6) and the Fourth Schedule to the Act, the landlords (having served the necessary statutory notice) obtained an order for possession against the head tenant. But the county court judge refused to make a similar order against the sub-tenant, on the ground that she was still protected by the Act of 1920, s. 15 (3).

The Court of Appeal found great difficulty in applying section 15 (3) to this case without the aid of section 41 of the Act of 1954. Section 15 (3) requires (1) a tenancy of a dwelling-house to which the Act of 1920 applies, and (2) determination of that tenancy. Was the head tenancy determined at the beginning or the end of the transitional period? If at the end, there can have been no moment when both conditions were fulfilled, because the Act ceased to apply at the beginning. If at the beginning (so that the head tenant during the period was merely a former statutory tenant), could a tenancy under section 15 (3) have existed between landlord and sub-tenant, while the head tenant was still in possession? Moreover, if an interest of a tenant is determined simply because the Act of 1920 ceases to apply to a house, can it be said in any circumstances that both the necessary conditions can exist simultaneously?

The court held, however, that it was not necessary to give a final decision on this point, since, in their view, section 41 of the Act of 1954 applied to this case. A dwelling-house to which the Act of 1920 applied (*i.e.*, the ground floor) formed part of premises not being such a dwelling-house (*i.e.*, the whole house at the moment when the head tenancy was determined) which had been let as a whole on a superior letting. Therefore, on the coming to an end of the superior letting the premises were to be treated for Rent Act purposes as if there had been separate lettings of the sub-let part and of the remainder of the premises: and upon that basis the sub-tenant was protected by the Act of 1920 (see *Cadogan* v. *Henthorne* [1957] 1 W.L.R. 1; [1956] 3 All E.R. 851). They rejected a contention of counsel for the landlords that section 41 applies only where the superior letting is contractual and not where it has become statutory. If the superior tenancy is not controlled at the moment when it comes to an end, then the section applies.

The court also rejected an argument on behalf of the landlords that since the Act of 1957 was a decontrolling Act and was silent on the subject of the protection of sub-tenants, then it was the intention of the legislature that sub-tenants should not be protected.

Leave to appeal to the House of Lords was refused.

Jaquin v. *Holland* [1960] 1 W.L.R. 258; [1960] 1 All E.R. 402 (C.A.)

Repair—good and tenantable repair—damages for breach of repairing covenant—diminution in value of reversion—effect of local

demand for houses.—The tenant in this case, who had agreed to keep the interior of a bungalow in good and tenantable repair, left the premises out of repair. The cost of putting the premises into good and tenantable repair was stated by the landlord's surveyor to be approximately £102, and by the tenant's surveyor to be approximately £91. The county court registrar, who heard the case at first instance, found that the diminution in the value of the freehold reversion, owing to the shortage and desirability of houses in the particular area, was £50. But the landlord, again owing to the shortage and desirability of houses in the area, had succeeded in reletting the bungalow after spending only £19 10s. The question was whether the proper measure of damages was £19 10s., the cost, in the view of the registrar, of "putting the property into a condition in which a reasonable tenant would be likely to take the house having regard to its class, character and locality" in accordance with the rule in *Proudfoot* v. *Hart* (1890) 20 Q.B.D. 42; or £50, (as found by the county court judge), the diminution in the value of the freehold reversion.

The Court of Appeal held that the measure of damages under the rule in *Proudfoot* v. *Hart* (which was accepted as the correct test in this case, subject, of course, to section 18 (1) of the Landlord and Tenant Act, 1927) was the amount which is necessary to put the house into a proper condition for letting in accordance with the terms of the covenant, so that it would be taken by a reasonable man wanting a house in a reasonable condition, having regard to the nature and type of house involved. It is not correct to say that because the circumstances are such that any house could be let in almost any condition, there is no obligation on a tenant to perform his covenant. The rule in *Proudfoot* v. *Hart* "is a guide as to the extent of the repairs which may be necessary in order to comply with a covenant of this kind. But it is a guide which calls in that useful individual the reasonable man acting in reasonable circumstances." Applying that test, the measure of damages at common law in this case, on the evidence of the surveyors, would have been far more than £50.

But the damages must not exceed the amount, if any, by which the value of the reversion is diminished (Landlord and Tenant Act, 1927, s. 18 (1)): and the value of the reversion is the value of the freehold estate of the landlord unincumbered by any lease, since, even if the property is immediately relet, there must always be a moment of time when the freehold estate free from any lease comes back to the landlord. Accordingly, on the findings of the registrar on this point, which were not challenged by the landlord, the damages to which the landlord was entitled were limited to £50.

Devlin L.J. doubted, however, whether the registrar was right in holding that owing to the shortage of houses in the area the diminution in the value of the landlord's reversion was limited to £50, even though the cost of repairs amounted to considerably more than that. It may be, therefore, that the proper measure of damages was more than £50. But since the landlord did not ask for more than £50, it was not necessary to decide this point, which was expressly left open.

Baker v. *Merckel*. *Anson* (*Third Party*) [1960] 2 W.L.R. 492; [1960] 1 All E.R. 668 (C.A.)

Surrender and regrant—lease for seven years—supplemental deed giving option to extend term—option exercised by assignee—defaults by subsequent assignee—liability of original tenant.—In *Re Savile Settled Estates* [1931] 2 Ch. 210 Maugham J. expressed the view (at p. 217) that "an alteration of an existing lease so that it will operate for a term extending beyond the original term can operate, in law, only as a surrender of the old lease and a grant of a new one." The lease in the present case was originally granted for a term of seven years from November 1, 1946, and it contained a covenant by the tenant to keep the premises in good and tenantable repair. By a supplemental deed executed in 1949 the landlord granted the original tenant an option to extend the term for a further period of four years, if the tenant so desired. In April 1951 the tenant assigned the lease with the benefit of the option to the third party: and in October 1951 the third party assigned it on the same terms to a fourth party. In 1952 the fourth party validly exercised the option: and he subsequently assigned the lease to a further assignee, who delivered up possession of the premises in 1957 in arrears with the rent and having broken the repairing covenant. This last assignee being unable to satisfy the judgment against her in respect of these defaults, the landlord sought to recover a similar sum from the original tenant, who contended that the rule of law stated by Maugham J. did not come into operation until the option was exercised in 1952, so that the original tenant was never a party to the extended lease. McNair J. held at first instance, first, that upon the facts of this case it was unnecessary to imply a surrender and a fresh grant, and, secondly, (in case he was wrong on the first point) that the surrender and regrant, if any, occurred in 1949, when the option was granted. In either event the original tenant was, in his view, liable for the defaults of the last assignee by privity of contract. Pearce L.J., with whom the other members of the Court of Appeal agreed, found it difficult on the authorities to avoid the implication of a surrender and a fresh grant in a case where a term of seven years had been varied to a term of seven years with an option for a further four years. But the court unanimously affirmed the decision of McNair J. on the second ground, namely, that the new lease was granted in 1949 to the original tenant, who could himself have exercised the option. There was an agreement in 1949 that the happening of an event (*i.e.*, the exercise of the option) should cause the original deed, including the repairing covenant, to be read as if it had originally been a lease for eleven years. There was no new agreement in 1952. A notice of extension, like a notice to quit, is not a consensual document, which depends in any way for its validity upon the consent of the other party (*cf. Hankey* v. *Clavering* [1942] 2 K.B. 326, 329). The notice in this case was not in conflict with the lease as altered by the deed of 1949: it arose out of it in accordance with its terms.

6. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

Wilkins v. *Rogerson* [1960] 2 W.L.R. 515; [1960] 1 All E.R. 650; [1960] T.R. 25 (Ch.D.)

Income tax—perquisite of employment—valuation

Statutory provisions: Income Tax Act, 1952, Schedule IX, rule 1.

Point: Where an employee taxed under Schedule E receives a perquisite or profit from his employment, such is liable to tax if it has a realisable value. The amount at which it must be brought into charge to tax is the value of the benefit thereby received by the taxpayer and not the cost of the benefit to the employer. Although a transaction may be carried out in more than one way with the like result so far as the parties are concerned but with differing tax effect, such does not alter the tax liability of the method in fact adopted.

Facts and decision: A company arranged with a named tailor that the tailor would supply each of its employees with a suit, which was a form of Christmas present by the company to the employees concerned. No cash passed between the company and any employee, but the employee was entitled to order and receive a suit up to the value of £15 and the company would foot the bill. The taxpayer ordered and received his suit from the tailor and the company paid the bill of £14 15s. The taxpayer was assessed to tax on the amount of £14 15s., but he contended that the only amount to be brought into his assessment was the value of the suit on the secondhand-market on the day on which he received it, which value was agreed at £5.

Held: by Danckwerts J. that the benefit which the employee received was the value of the suit in his hands, namely £5 and not the cost of the provision thereof, namely £14 15s. His lordship remarked that it was possible to find cases where the only measure of the value of what the employee had received would be the amount of the payment which had been made (see *Nicoll* v. *Austin* (1935) 19 T.C. 531). Applying, however, the dictum of Lord Macnaghten in *Tennant* v. *Smith* (1892) 3 T.C. 158, to the effect that the employee is to be taxed "not on what saves his pocket but on what goes into his pocket" the secondhand value and not the cost of provision was clearly the taxable sum.

Grosvenor Place Estates, Ltd. v. *Roberts* [1960] 2 W.L.R. 531; [1960] 1 All E.R. 643; [1960] T.R. 7 (Ch.D.)

Income tax—long lease—taxation of landlord

Statutory provision: Income Tax Act, 1952, ss. 148, 170 and 177.

Point: Where rent is payable under a long lease, namely, one granted for a term exceeding fifty years and not determinable after death or marriage, section 177 of the Income Tax Act, 1952, applies and tax at the standard rate is deductible on the payment thereof. Where the payment is not made out of profits or gains brought into charge, the person making the payment is bound to deduct tax at the standard rate under section 170. This is a mandatory provision, as is the

further provision that the Commissioners shall assess the payer. However, if the payer fails to deduct tax despite his duty so to do, the duty of the Commissioners to assess the payer does not oust their right to assess the payee, *i.e.*, the landlord, under section 148.

Facts and Decision: The National Coal Board, as tenant of a large property with a rent of just under £100,000 per annum on a long lease, failed to deduct tax on paying its rent. The Special Commissioners did not assess or charge the payments in any way on the National Coal Board. However, an assessment was made on the landlord in respect of the rents received by him. The landlord contended that there was no power to assess the landlord in such a case, in view of the mandatory wording of section 170, which made it the duty of the Commissioners to assess the tenant.

Held: by Danckwerts J. that the landlord could be assessed, following the decision of Bray J. in *Glamorgan Quarter Sessions* v. *Wilson* [1910] 1 K.B. 725.

This is an important decision and confirms the dictum of Upjohn J. in *Stokes* v. *Bennett* [1953] Ch. 566. It is applicable to all cases where section 170 is brought into operation, not only where the taxable amount is a rent.

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7. *PLANNING CASES*

By V. G. Wellings, m.a.(Oxon.), Barrister-at-Law

Belfast Corporation v. *O. D. Cars, Ltd.* [1960] 2 W.L.R. 148; [1960] 1 All E.R. 65

Refusal of planning permission—whether a "taking of property." —In England and Wales this question is academic but in Northern Ireland it is material because, by section 5 of the Government of Ireland Act, 1920, the Northern Ireland Parliament is deprived of power to make a law so as either directly or indirectly to take any property without compensation. In an Act of 1931 that Parliament, after providing for compensation for injurious affection to land arising in consequence of planning schemes made under that Act, enacted that property should not be deemed to be injuriously affected by reason of the coming into operation of any provisions inserted in such a scheme. In 1954 O. D. Cars applied for permission to erect shops on their land. This permission was refused and in proceedings by O. D. Cars claiming compensation for injurious affection it was contended that compensation was excluded under the 1931 Act. On the question whether the Northern Ireland Parliament in the 1931 Act was authorising a taking of property, the House of Lords held that the Parliament was exercising its function of regulating the use of land rather than the "taking" of property. Viscount Simonds expressed the view that the right to use property in a particular way is not itself property. On this point see *M. & J. S. Properties* v. *White* [1959] 2 Q.B. 25; [1959] 2 All E.R. 81; 23 *Conveyancer* 231.

Mounsdon v. *Weymouth & Melcombe Regis Corporation*
[1960] 2 W.L.R. 484; [1960] 1 All E.R. 538 (D.C.)

Enforcement notice—appeal to justices—permission subject to conditions—breach—powers of justices.—In *Eastbourne Corporation* v. *Forte's Ice Cream Parlour* [1959] 2 Q.B. 92; 23 *Conveyancer* 236, the Court of Appeal held that the powers of the justices on an appeal under section 23 (4) of the Act of 1947 against an enforcement notice enabled them to inquire whether the development alleged had in fact been carried out. This view has now been taken a stage further by the Divisional Court in *Mounsdon* v. *Weymouth & Melcombe Regis Corporation*. In that case it was decided that the justices on such an appeal, where the enforcement notice relates to a breach of condition to which a planning permission is subject, are not limited to consideration of the question whether the conditions have been complied with; they can go further and can quash the notice on the ground that there has been no development or that permission was not (for any other reason) required or on any other ground mentioned in section 23 (4). Ashworth J., giving the judgment of the court, said that the words "as the case may be" in section 23 (4) (*a*) were inserted for the purpose of clarification and not for that of restricting the justices' jurisdiction where non-compliance with a condition is alleged. On a further point the court, following *Swallow & Pearson* v. *Middlesex C. C.* [1953] 1 All E.R. 580, held that the owner, by having applied for permission, was not precluded from asserting that the permission was unnecessary.

THE LIBRARY

Corfield on Compensation. By F. V. Corfield, Barrister-at-Law. Solicitors' Law Stationery Society, Ltd. xlviii, 430 and (index) 21 pp. (£3 17s. 6d.)

The practitioner who undertakes conveyancing work has to have an adequate knowledge these days of the various courses open to a client who finds that he cannot do what he would like to with his land or, worse still, is in danger of being dispossessed by a local authority. Whilst money cannot always compensate for the loss of amenities or pride of ownership, it can go a long way. This authoritative book written by one who is a politician, a farmer and a barrister all in one person falls into two parts—first, a factual account of the principles of compensation in relation to land law, and, second, a well-annotated explanation of the Town and Country Planning Act, 1959. The descriptive part which extends to 120 pages—a third being devoted to the changes made by the 1959 Act— is a masterly summary of an extremely complicated subject. It is the essence of the book, and your reviewer can confidently recommend it to anybody who wants to get a proper perspective in his mind's eye, so that he can see the reason behind an outwardly illogical and arbitrary set of rules and regulations. The subject is not one which lends itself to literary style and the danger of paraphasing statutory language is well known, but the writing is clear and the references in footnotes are full.

The title page calls the work "Compensation and the Town and Country Planning Act, 1959," giving equal prominence to each limb. Part II of the 1959 Act (Acquisition, Appropriations and Disposals of Land by Local Authorities) is not even to be cited as part of the Town and Country Planning Acts, 1947–59 (see s. 59), and Part III (Administrative Procedures, etc.) is scarcely more germane. The author has thus placed himself in a dilemma of his own making: should he include the irrelevant parts of the 1959 Act for the sake of completeness or should he concentrate entirely on the subject of compensation? He has chosen to do the former, probably because he is the first in the field to write a textbook on the new Act and this is a good selling point. Yet it seems to your reviewer to unbalance the book; there is no logic in including the 1959 Act and leaving out the compensation provisions of the 1947 and 1954 Acts.

Where the book undoubtedly scores is through the almost subjective approach that the learned author can make in his parliamentary guise. He had almost a personal interest in the progress of the Bill, to which his own abortive measure introduced the previous year was a forerunner. Hence he could keep abreast of the arguments and explanations at the various stages in the House of Commons and had *Hansard* to help him when the Bill went to another place. The result is that often the notes are enlivened by extracts from the official reports judiciously selected to explain the background to a cryptical section. A good example of this sort is to be found in the notes on the difficult section 5 (which introduces the fiction of a notional and more valuable use different from that for which a local authority are buying land) at pp. 143 and 147. Nor is the author afraid of venturing his own views on open questions, as for instance in the notes on pp. 276–278 to section 38, which was passed to remedy the position in *Cater* v. *Essex C. C.* [1959] 2 W.L.R. 739. The busy practitioner may well be put on the scent of an attractive argument to use against a local authority when his client is smarting under an enforcement notice.

The book is almost essential in the library of a lawyer who cannot afford the more compendious works on planning, and very useful also to those who can.

J. D. S.

The Law of Agency. By G. H. L. Fridman, M.A., B.C.L., LL.M. Barrister-at-Law. Butterworth & Co. (Publishers), Ltd. xlvii, 286 and (index) 7 pp. (£1 17s. 6d.)

At one time, the law of agency received scant treatment and, apart from *Bowstead*, the practitioner was largely dependent on the ordinary books on contract, but the subject seems to be attracting more writers. Mr. Fridman's book appears to be intended primarily for the student though there is sufficient detail for the practitioner over much of the field. He is not entirely satisfactory on the question of termination of agency. Bankers' authority to honour cheques continues until they have notice of death, whatever may be the position of other agents. A winding-up order terminates the authority of the company's agents (not the dissolution of the company) (p. 267). *Drew* v. *Nunn* (1879) 4 Q.B.D. 661 and *Yonge* v. *Toynbee* [1910] 1 K.B. 215 are almost certainly irreconcilable but are of equal authority, for both are decisions of the Court of Appeal and the latter case decided after the former had been cited in argument. It must not, however, be overlooked that if a solicitor commences proceedings for a client who has become insane, the client would not normally be liable on the basis of holding out, for it is unlikely that in fact he would have held out the solicitor as his agent. If the solicitor were not liable for breach of warranty, no one would be liable. While on the subject of solicitors, we wondered whether the author took the view that they must still be authorised by resolution of a company's board to take proceedings, but, although he sets forth the general principles accurately, he does not descend to detail. Powers of attorney are of the greatest importance in practice and we suggest that they justify a chapter on their own covering the principles, procedure and practice. For example if A grants a general power of attorney in favour of B and provides that it is to be irrevocable for a year, can A revoke it in fact? Certainly the Central Office will record a notice of revocation. Incidentally, on p. 274, "affect" is wrongly spelt "effect" no fewer than three times.

This work is certainly a useful contribution to the study of the subject, which is difficult—the author cannot be blamed for this—but nevertheless we must make some reservations in recommending it to the practitioner. It is not that there are many errors—so far as we could see there were few indeed—but there is a certain academic air about the approach and practitioners are very mundane people. We have still to find the ideal book on agency.

E. F. G.

We have also received:

Emmet on Title. Fourteenth ed. Second (Cumulative) Supplement to October 31, 1959. By J. Gilchrist Smith, LL.D. The Solicitors' Law Stationery Society, Ltd. xxx and 172 pp. (£1 5s.). This supplement has the encyclopedic touch that one would expect from the editor—"author" is the more apt word. Conveyancing practice moves by almost imperceptible degrees, except for occasional eruptions. There have been no such eruptions of recent years.

Contracts and Conditions of Sale of Land. Second ed. First Supplement to January 1, 1960. By E. O. Walford, LL.D., Solicitor. Sweet & Maxwell, Ltd. 24 pp. (6s.). This supplement was necessitated by the issue of the 17th edition of the National Conditions of Sale, but the author has taken the opportunity

to collect together the recent cases—and there are quite a lot of them—on his subject. He disagrees with the decision in *Halsall* v. *Brizell* [1957] Ch. 169, but that decision has a perfectly impeccable ancestry and accords with the general understanding of the position by practitioners. The position of an estate agent holding a deposit is, we suggest, not nearly as simple as the author would have us believe: see Macintyre's "Loss of the deposit" (1958) 22 *Conveyancer*, p. 258.

The Solicitor's Guide to Development and Planning. Second Cumulative Supplement. By R. N. D. HAMILTON, LL.B., Solicitor. Solicitors' Law Stationery Society, Ltd. 50 pp. 7s. 6d. (or, with main work, 50s.). This supplement brings the main work up to date, dealing with the 1959 Act and the latest cases; among the latter, we would have described *Att.-Gen.* v. *Smith* [1958] 3 W.L.R. 81 as an "interesting illustration" of the application of recognised procedure rather than as an "important development" (see p. 33).